Volume 8, No. 20, Pages 6999 to 7224, September 20 - October 1, 1993

FCC Record

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FEDERAL COMMUNICATIONS COMMISSION

***James H. Quello, Chairman**

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Citation Form: 8 FCC Rcd 1 (1993)

*Commissioner Quello designated as Chairman effective February 5, 1993.
**Commissioner Marshall resigned effective April 30, 1993.

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-246

In re Applications of

KB BROADCASTING, INC. File No. BPH-920604MC
(hereafter "KBB")

LYNN KETELSEN File No. BPH-920604MD
(hereafter "Ketelsen")

For Construction Permit
for a New FM Station on Channel 265A
in Blooming Prairie, Minnesota

HEARING DESIGNATION ORDER

Adopted: August 24, 1993; Released: September 20, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *FAA.* Attempts to obtain FAA clearance through the Commission's Support Services Branch and KBB have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by KBB would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

3. *Financial.* In his response to Item 3, Section III, Page 6, FCC Form 301 ("Financial Qualifications"), Ketelsen has omitted the address of the source of his funds. Ketelsen shall submit this information to the presiding Administrative Law Judge.

4. *Late-Filed Amendments.* The applicant below has petitioned for leave to amend his application on the date shown. The accompanying amendment was filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT FILED
Ketelsen	2/19/93

5. *Comparative Coverage.* Data submitted by the applicants indicate there would be a significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by KBB would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

9. IT IS FURTHER ORDERED, That Ketelsen shall submit the information, specified in Paragraph 3 above, to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Ketelsen (2/19/93) IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order

(see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTERNATIONAL TELECHARGE, INC.,
Complainant,

v.

THE BELL ATLANTIC TELEPHONE COMPANIES,
Defendants.

File No. E-92-73

ORDER

Adopted: September 13, 1993; Released: September 20, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On May 4, 1992, International Telecharge, Inc. (ITI), filed the above-captioned formal complaint against The Bell Atlantic Telephone Companies (Bell Atlantic) seeking to recover damages from Bell Atlantic for alleged violations of the Commission rules in connection with Bell Atlantic's computation and assessment of terminating carrier common line ("CCL") charges. On September 1, 1993, ITI and Bell Atlantic filed a joint motion to dismiss the complaint stating that the parties have negotiated a mutually agreeable settlement of all pending controversies.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss Complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints
and Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MICRONESIAN TELECOMMUNICATIONS CORP. File No. I-T-C-92-151

Application for authority under Section 214 of the Communications Act of 1934, as amended, to establish international telecommunications services between the Commonwealth of the Northern Mariana Islands and various overseas point via transit facilities

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 10, 1993; Released: September 20, 1993

By the Chief, International Facilities Division:

1. We have under consideration the above-captioned application filed by the Micronesian Telecommunications Corp. (MTC) for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to provide international telecommunications services via transiting facilities between the Commonwealth of the Northern Mariana Islands (CNMI) and several overseas points not presently served by MTC. We placed the application on public notice April 22, 1992. IT&E Overseas, Inc. (IT&E) filed a petition to deny the application, and MTC filed an opposition in response.

2. MTC requests authority to provide its regularly authorized telecommunications services via transit facilities between CNMI and overseas points listed in the Appendix. MTC states that it will seek appropriate authority if it decides to begin direct service to any of the overseas points.

3. IT&E's petition to deny is based on alleged violations of the GTE Consent Decree[1] and alleged anticompetitive conduct by MTC. Specifically, IT&E cites several examples of anticompetitive conduct which primarily relate to its inability to have what it deems suitable access to scarce facilities controlled by MTC. IT&E also claims that the GTE Consent Decree prohibits MTC from initiating new international services from the CNMI. IT&E states that these issues are being pursued more formally before the Department of Justice in the context of a request for investigation and enforcement of the GTE Consent Decree,[2] but that the Commission should deny MTC's application.

4. MTC denies the allegations of anticompetitive conduct as well as IT&E's claims that the proposed service violates the GTE Consent Decree. MTC notes that Section V(C)(1) of the GTE Consent Decree specifically permits Hawaiian Telephone Company, and inherently its subsidiary MTC, to provide international services. MTC states that these issues are not properly raised in the context of a Section 214 application since the GTE Consent Decree is administered by the District Court and the Department of Justice.

5. We dismiss IT&E's petition to deny the application because of alleged violations of the GTE Consent Decree. It is the District Court and the Department of Justice, and not this Commission, that are charged with determining whether certain actions are in violation of the GTE Consent Decree. IT&E acknowledges that the issues raised will be addressed in a formal investigation by the Department of Justice. Our authorization herein will be subject to any decision by the Department of Justice and the District Court with respect to the alleged violation of the GTE Consent Decree. The Commission will take appropriate steps, if necessary, once a decision is rendered on this issue.

6. We therefore find that the present and future public convenience and necessity will be served by authorization of the requested facilities and services.

7. Accordingly, IT IS ORDERED that application File No. I-T-C-92-151 IS GRANTED, and Micronesian Telecommunications Corporation (MTC) is authorized to use 60 voice grade circuits between CNMI and Hawaii, transiting the facilities of GTE Hawaii Telephone Company, for the provision of switched voice services between CNMI, on the one hand, and the points listed in the Appendix, on the other hand.

8. IT IS FURTHER ORDERED that IT&E's petition to deny the application IS DISMISSED.

9. IT IS FURTHER ORDERED that neither applicant nor any persons or companies directly or indirectly controlling or controlled by applicant, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which applicant or any persons or companies controlling or controlled by applicant are parties.

10. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

11. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic for the points listed in the Appendix, as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

12. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit addition reports for those circuits used for the provision of service between CNMI and the points listed in the Appendix, pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

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[1] United States v. GTE Corporation, Civ. Action No. 83-1298, Trade Cas. (CCH) 66,355 (D.D.C. 1985) ("the GTE Consent Decree").

[2] On May 30, 1992 IT&E filed with the Department of Justice to investigate specific activities of GTE Hawaiian Telephone Company and MTC, both subsidiaries of GTE Corporation.

13. IT IS FURTHER ORDERED that the applicant shall file an application pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214, before establishing direct circuits between CNMI and any of the points listed in the Appendix.

14. IT IS FURTHER ORDERED that applicant shall file with the Commission a copy of any operating agreement it enters into with its foreign correspondents within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

15. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

16. IT IS FURTHER ORDERED that this authorization is subject to further Commission action on the issue of transiting.

17. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Afghanistan
Aruba
Botswana
Burkina Faso
Burundi
Cape Verde
Central Africa Republic
Comoros
Congo
Djibouti
Dubai
Equatorial Guinea
Falkland Islands
Gabon Republic
Gambia
Ghana
Gibraltar
Guadeloupe
Guinea
Laos
Maldives
Mali
Malta
Martinique
Mauritania
Mauritius
Mongolia
Namibia
Nepal
Qatar
Reunion Island
Rwanda
Seychelles
Somalia
St. Pierre
Syria
Toklau Islands
Tunisia
Uganda
Yemen
Zaire

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ASSOCIATED COMMUNICATIONS OF LOS ANGELES, INC.

File No. I-T-C-93-202

Application for Authority Under Section 214 of the Communications Act of 1934, as amended, to establish and operate channels of communication between the United States and the TDRS satellite system, for the provision of international data, voice, audio, television and video service between the United States and Japan, the Republic of Korea and Taiwan

ORDER, AUTHORIZATION AND CERTIFICATION

Adopted: September 13, 1993; Released: September 20, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity will be served by authorization of the requested facilities and services.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-202 IS GRANTED and Associated Communications of Los Angeles (ACLA) is authorized to:

a. establish up to ten (10) voice grade circuits between appropriately licensed earth stations in the United States and the TDRS-174 satellite system, for the provision of private line service, not interconnected with the public switched network, between the United States, on the one hand, and Japan, Republic of Korea (South Korea)[1] and Taiwan,[2] on the other hand;[3]

b. establish channels of communication between appropriately licensed earth stations in the United States and the TDRS-174 satellite system, for the provision of video transmissions,[4] not interconnected with the public switched network, occupying up to three (3) 40 MHz transponders on the TDRS satellites between the United States, on the one hand, and Japan, South Korea and Taiwan, on the other hand.

3. IT IS FURTHER ORDERED that our authorization of the applicant to provide private lines is limited to the provision of such private lines only between the United States and Japan, South Korea or Taiwan -- that is, private lines which originate in the United States and terminate in Japan, South Korea or Taiwan, or which originate in Japan, South Korea or Taiwan and terminate in the United States. In addition, the applicant may not -- and the applicant's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic communications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither the applicant nor any persons or companies directly or indirectly controlling or controlled by the applicant, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which the applicant or any persons or companies controlling or controlled by the applicant are parties.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

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[1] ACLA initially requested authority to provide its proposed services between the United States, on the one hand, and Japan and Taiwan, on the other hand. ACLA subsequently amended its application to include South Korea as a point of communication. *See* Letter, dated June 4, 1993, from Catherine Wang, Counsel for ACLA, to Donna R. Searcy, Secretary, Federal Communications Commission.

[2] *See* Public Notice Report No. IS-0037.

[3] Should ACLA obtain any interest in facilities beyond Japan, South Korea or Taiwan for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 60 R.R. 2d 1435 (1986), it would be necessary for ACLA to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

[4] ACLA states that these transmissions will include broadband analog and digitally compressed television programming.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit addition reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

8. IT IS FURTHER ORDERED that the applicant shall file an application pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214, before adding any circuits or channels of communication for the provision of service over any separate satellite system or private cable.

9. IT IS FURTHER ORDERED that the applicant shall file with the Commission a copy of any operating agreement it enters into with any of its foreign correspondents within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

10. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-93-248

Application for authority to acquire and operate facilities for service between the U.S. and Turks and Caicos.

ORDER AND AUTHORIZATION

Adopted: September 13, 1993; Released: September 20, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Turks and Caicos by MCI Telecommunications Corporation (MCI).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-248 IS GRANTED and MCI is authorized to:

a. lease from Comsat and operate 16 voice-grade satellite circuits between the Niles Canyon, California earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Turks and Caicos furnished by MCI's correspondent in Turks and Caicos;

b. lease and operate 16 voice-grade circuits in the Niles Canyon earth station to be used in conjunction with the satellite space segment capacity;

c. lease and operate 16 voice-grade connecting circuits between the Niles Canyon earth station and MCI's Dominguez Hills, California operating center; and

d. use said facilities to provide MCI's regularly authorized services between the U.S. and Turks and Caicos.

3. IT IS FURTHER ORDERED that our authorization of MCI to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Turks and Caicos -- that is, private lines which originate in the United States and terminate in Turks and Caicos or which originate in Turks and Caicos and terminate in the United States. In addition, MCI may not -- and MCI's tariff must state that MCI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Turks and Caicos end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Turks and Caicos affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991) *petitions for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling or controlled by MCI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MCI or any persons or companies controlling or controlled by MCI are parties.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. Section 63.15(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

G. C. Cooper
Trading/as
Easton Television

File No. 4111-CM-P-83

For Authority to Construct and
Operate a Multichannel Multipoint
Distribution Service station on
the E-group channels at Easton,
Maryland

MEMORANDUM OPINION AND ORDER

Adopted: September 10, 1993; Released: September 21, 1993

By the Chief Domestic Facilities Division:

1. *Introduction.* G. C. Cooper Trading/as Easton Television (Cooper) filed a petition for reconsideration of the determination by the Domestic Facilities Division (Division) that the above-referenced application to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Easton, Maryland was unacceptable for filing.

2. *Division Return.* The Division determined that Cooper's application was unacceptable for filing because it failed to make a showing of how interference with the operation of adjacent channels would be avoided, and what steps the applicant has taken to comply with 47 C.F.R. § 21.902(a), as required by 47 C.F.R. § 21.901(d)(7). Accordingly, the application was returned pursuant to 47 C.F.R. § 21.20(a).

3. *Petition.* Cooper argues that in Exhibit H of his application he stated that he would use coordination and "all legitimate engineering techniques" to avoid interference, and that this constitutes a sufficient showing under 47 C.F.R. § 21.901(d)(7). Cooper also argues that his application, taken as a whole, clearly demonstrates his awareness of the Commission's rules and requirements regarding interference. Finally, citing *James River Broadcasting Corp. v. FCC*, 399 F.2d 581 (D.C. Cir. 1968), Cooper argues that his application was "substantially complete" when filed, and thus should not have been returned.[1]

4. *Discussion.* Prior to the filing of any MMDS application, the Commission declared that each MMDS applicant had to submit, as part of its application, a specific technical interference protection showing for cochannel and adjacent-channel stations.[2] To effectuate its decision, the Commission added 47 C.F.R. § 21.901(d)(7) to the Commission's rules.[3] Similarly, the consequences of failing to provide this demonstration was unequivocally stated.

> We stress again that we expect applicants to address this problem in their applications. *Those applications that do not contain an analysis of how the applicant intends to avoid cochannel interference in adjacent areas will not be considered acceptable for filing.*

MMDS Allocation Order, 94 FCC 2d at 1264 (emphasis in original)

5. This interference protection showing is a significant requirement because the Commission, in reallocating spectrum from the Instructional Television Fixed Service (ITFS) to MMDS, did so with the understanding that certain adjacent-channel interference problems might arise, *Id* at 1246.[4] Many of those commenting on the MMDS reallocation proposal expressed the view that such operations were not technically feasible using existing MDS or ITFS equipment. Others expressed the view that such operations were feasible, but the stations had to be carefully engineered.[5] A prospective MMDS licensee's ability to provide interference protection to other cochannel or adjacent channel licensees was an integral part of the Commission's reallocation plan. The technical showing required by 47 C.F.R. § 21.901(d)(7) helps to ensure that a licensee will be able to resolve interference problems. This is particularly important because, at the time Cooper filed his application, MMDS applications for immediately adjacent areas were filed on the same day, without the submission of interfer-

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[1] Cooper has also filed a new Exhibit H which provides a detailed discussion of the techniques he would use to avoid co-channel and adjacent channel interference.

[2] *Amendment of Parts 2, 21, 74, and 94 of the Commission's Rules and Regulations with regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 94 FCC 2d 1203, 1247, 1264 (1983) (*MMDS Allocation Order*).

[3] This rule provision requires each MMDS applicant to show how interference with the operation of adjacent channels would be avoided and to show what steps had been taken to comply with 47 C.F.R. § 21.902(a). Section 21.902(a) requires, *inter alia*, MDS applicants to make exceptional efforts to avoid blocking potential adjacent-channel use in the same city and cochannel use in nearby cities. "To assist us in enforcing Section 21.902(a)... the applicant must explain what efforts it has made to comply with this section." *Id.* at 1264.

[4] The assignment of the four E channels to one station and the four F channels to another station "has the disadvantage that wide spread adjacent channel interference could occur if the transmitters of the two operators are not collocated." *Id.* at 1264. "[T]he use of channels in one pair of an interleaved group [such as the E-group] tends to preclude use of the other group [such as the F-group] in the same area." *Id.* For this reason, the Commission emphasized that it would " require each applicant to include, as part of its application, an analysis of the potential for adjacent channel interference with a non-collocated licensee operating on the interleaved channel group." *Id.* at 1247.

[5] To mitigate the effects of the problem of "gridlock", the Commission decided to group MMDS applications for lottery, where possible, according to Metropolitan Statistical Areas (MSAs), Consolidated Metropolitan Statistical Areas (CMSAs) or New England Consolidated Metropolitan Areas (NECMAs) in which the MMDS transmitter sites were located. "Gridlock" is the situation in which a large number of applications are filed in multiple adjacent areas resulting in all the applications being considered mutually exclusive. Although this lottery grouping method eliminates the "gridlock' problem where there are statistical areas, it can result in some cochannel stations being spaced more closely than would be allowed by traditional rules for determining the potential for harmful interference. *Id.* at 1264.

ence analyses which are usually required for applications proposing cochannel and adjacent-channel stations located within 50 miles or the radio horizon. *Id.* at 1265.[6] See 47 C.F.R. § 21.902(c).[7]

6. In addition, it is important that an applicant file a complete application providing all necessary information including that information necessary for evaluation of the applicant's qualifications to be a MMDS licensee. Without this information, the Commission cannot make the public interest determination that the applicant is legally, technically, and financially qualified to be a licensee. *See also* 47 C.F.R. § 21.13(a).

7. Cooper argues that in Exhibit H of his application he stated that he would use coordination and "all legitimate engineering techniques" to avoid interference, and that this constitutes a sufficient showing under 47 C.F.R. § 21.901(d)(7). Cooper claims that the phrase "all legitimate engineering techniques" encompasses everything that might have been included in a more extensive discussion. He also contends that the issue here is how many specific words an applicant must use to make the showing required by Section 21.901(d)(7), and that his application was returned merely because the words he used in Exhibit H were not sufficiently detailed and expanded. We disagree. Section 21.901(d)(7) requires an analysis of the specific techniques an applicant would use to avoid any interference problems involving his particular proposal.[8] *See MMDS Allocation Order*, 94 FCC 2d at 1264. In the *MMDS Allocation Order*, we stressed that applicants must address this issue in their applications, and provide specific examples of the kinds of techniques which might be used. *Id.* at 1264. An applicant's general statement that he would use "all legitimate engineering techniques" does not constitute the kind of showing discussed in the *MMDS Allocation Order* and required under 47 C.F.R. § 21.901(d)(7).[9]

8. The *MMDS Allocation Order* prescribed the filing requirements to be observed by MMDS applicants. The order specifically stated that "all applications are expected to comply with all pertinent sections of Part 21, including those we are adopting today...." *Id.* at 1238. Each MMDS applicant is required to demonstrate its technical qualifications to be an MMDS license. 47 C.F.R. § 21.13. Cooper failed to submit the necessary interference protection showing required by Section 21.901(d)(7). This omission rendered the application defective and not in a "condition acceptable for filing".[10] Thus, the application was returned as unacceptable for filing,[11] in accordance with 47 C.F.R. § 21.20(a).

9. *Conclusion.* Having carefully considered all of the above arguments and evidence submitted by Cooper, we find that it was proper for the Division to return Cooper's application as unacceptable for filing, and reconsideration and reinstatement *nunc pro tunc* is not warranted. Accordingly, Cooper's request for reconsideration and restatement of the above-referenced application IS DENIED.[12] This order is issued pursuant to 47 C.F.R. § 0.291 and it effective on its release date. See 47 C.F.R. §§ 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

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[6] The Commission waived for all MMDS applicants filing on the initial filing date the requirement that applicants file the interference analyses required by 47 C.F.R. § 21.902(c).

[7] "Because it is possible that two new MDS construction [authorizations] will be granted simultaneously in some markets, and because it is possible that MDS or ITFS operations in markets that are in close proximity may present potential interference problems, it will be difficult for applications to comply fully with Section 21.902(a)." *Id.* at 1265.

[8] For example, Cooper's new Exhibit H includes three pages of discussion regarding specific techniques he would use, and indicates that because the proposed site is in a sparsely populated area, these techniques, combined with cooperation among neighboring operators, should be sufficient to avoid co-channel and adjacent channel interference. However, to the extent that Cooper seeks to meet the requirements of Section 21.901(d)(7) by filing a new exhibit H, we reject the argument that he should be permitted to file a curative amendment and have his application reinstated *nunc pro tunc*, for further processing. As discussed below, we find that the Division's initial return of Cooper's application as unacceptable for filing was correct, and thus, *nunc pro tunc* reinstatement is not warranted.

[9] Citing *James River*, 399 F.2d at 581, Cooper also argues that his application was "substantially complete" when filed, and thus should not have been returned. However, *James River* is no longer applicable to applications filed under Part 21 of the Commission's rules. *See Report and Order*, 60 FCC 2d 549, 552 (1976); *Allen C. Moore dba Moore's Service*, 86 FCC 2d 787, 793-95 (Com. Car. Bur. 1981) (discussing Part 22 rules based on rules in Part 21). Furthermore, the standard for evaluating applications under Part 21 of the rules is not "substantial completeness," but rather "acceptability for filing." *See* Section 21.20(a). In the *MMDS Allocation Order*, we specifically stated that an application failing to include the analysis required by 47 C.F.R. § 21.901(d)(7) would not be considered acceptable for filing. Accordingly, Cooper's application was properly returned as unacceptable for filing, pursuant to 47 C.F.R. § 21.20(a), for failure to include the technical showing required by 47 C.F.R. § 21.901(d)(7). We also note that Cooper refers to the language in 47 C.F.R. § 21.20(a)(2) regarding the need to "substantially comply" with the Commission's rules. However, we find that Cooper has not "substantially complied" with the requirements of 47 C.F.R. § 21.901(d)(7).

[10] In items 33 and 36 of his application, Cooper acknowledged that he was familiar with Part 21 of the Commission's rules that are relevant to MMDS. Any applicant who "either ignores or fails to understand clear and valid rules of the Commission respecting the requirements for an application assumes the risk that the application will not be acceptable for filing." *Ranger v. FCC*, 294 F.2d 240, 242 (1961).

[11] See *Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to the Domestic Public Services (Other than Maritime)*, 60 FCC 2d 549 (1976); see also *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713 (1987).

[12] On September 10, 1992, Cooper filed a petition for special relief requesting that the Commission consider his pending petition for reconsideration. As the petition for reconsideration is addressed herein, Cooper's petition for special relief is dismissed as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-403

In re Applications of

EVANSVILLE SKYWAVE, INC. File No. BPH-870430OK

For Construction Permit for a
New FM Station on Channel 298A
at Evansville, Indiana

Appearances

Donald J. Evans on behalf of Evansville Skywave, Inc. and *Robert Zauner* on behalf of the Mass Media Bureau.

CORRECTED

DECISION

Adopted: August 24, 1993; Released: September 20, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE.

Board Member BLUMENTHAL:

1. The Board has before it the *Supplemental Initial Decision*, 8 FCC Rcd 26 (1992) (*S.I.D.*), of Administrative Law Judge Edward J. Kuhlmann (ALJ). It also has before it the Exceptions of Evansville Skywave, Inc. (Skywave) filed on January 27, 1993 and a so-called "*Erratum*" thereto filed on March 25, 1993, as well as the Reply of the Commission's Mass Media Bureau (Bureau) filed February 8, 1993.[1] In sum, the *S.I.D.* found against Skywave on the following three issues:

(1) To determine whether Skywave is financially qualified to construct and operate the proposed Evansville, Indiana FM Station.

(2) To determine whether Skywave has misrepresented facts or lacked candor in certifying that it is financially qualified to construct and operate the Evansville station, and, if so, the effect thereof upon its basic qualifications.

(3) To determine whether Sondra Matthews or Leon Perkinson misrepresented facts or lacked candor in their deposition testimony and, if so, the effect thereof upon the basic qualifications of Skywave.

Skywave was thus found unqualified to be a licensee. Whereas Skywave excepts to all of the adverse findings and conclusions, and contrary to its prior support of Skywave, the Bureau now supports the ultimate result of the *S.I.D.* that Skywave's purported "general" partner, Sondra Matthews "intentionally testified falsely" about Skywave's finances, Bureau Reply at 7, and that she displayed a "lack of candor while testifying on these matters." *Id.*, at 11. The Bureau too would now deny Skywave's application.

BACKGROUND

2. As aptly observed by Skywave, "[i]t is now nine years since this allotment was proposed and six years since it was allocated...." Exceptions at 2. The long and crooked tail of this case was partially disclosed in the *Initial Decision*, 6 FCC Rcd 1356 (ALJ 1991) (*I.D.*), where the ALJ noted that Skywave was, of seven original applicants, the sole remaining contestant, having reached a settlement prior to the hearing with its only remaining competitor, Tri-State Development and Communications Corp. of Evansville, Inc. Ironically, neither Tri-State nor Skywave wished to acquire or operate a station on this Indiana frequency, so they reached an August 19, 1989 agreement to pre-sell this Construction Permit (not yet won by either) to a non-party, Walter Threadgill, who would be licensed to operate the station d/b/a Fed City Communications, Inc. *See id.*, 6 FCC Rcd at 1356.[2] However, because the Commission's policies on settlements permitting the assignment of broadcast permits to non-parties was, just then, in rather a state of flux, *see Rebecca Radio of Marco*, 4 FCC Rcd 830 (1990)(2-1 vote; Comm'r Quello dissenting)(approving set-

[1] The case was originally heard by late Board Member Eric T. Esbensen. Pursuant to 47 CFR § 0.361(c), Board Member Greene has now read the record in this docket and participates in his stead.

[2] The *I.D.* there explained:

> In fact, Tri-State and Skywave agreed in August 1989 to give up their pursuit of this frequency and they asked the Commission to award the facility to a non-party, Walter Threadgill, who, it was claimed, would organize Fed City Communications, Inc. to become the licensee. Because the Commission does not permit a third party grant in initial licensing cases, the settlement agreement was rewritten. The original agreement provided that Threadgill would pay Skywave and Tri-State $175,000 each and he would receive the construction permit. The parties continued to search for a way that Threadgill or Fed City would receive the grant and not violate the Commission's prohibition. Under an agreement, filed March 21, 1990, Fed City would have been allowed to obtain 49% of Skywave for $25,000; Fed City agreed to finance the proposal; and had the right to designate one of three Skywave directors. The agreement provided that six months after the station was "operational" Fed City would have the right to purchase the remaining 51% or Skywave could demand or put its 51% interest to Fed City. If Fed City takes control then it will pay Tri-State $100,000 and Skywave an additional $250,000. If it does not take control, then Skywave must pay Tri-State an additional $75,000. The Bureau urged disapproval of this scheme because Skywave did not retain an option to operate the station. The Bureau concluded that it was still apparent that the applicants had no interest in operating the station.

tlement among 7 applicants to "sell" permit to non-party), *reversed sua sponte*, 5 FCC Rcd 937 (1990), *recon. denied*, 5 FCC Rcd 2913 (1990), the Bureau opposed the August 1989 settlement between Skywave, Tri-State and Threadgill; but the Bureau did thereafter minister a "reform" of the tripartite agreement, which settlement it (then) supported. *I.D.*, 5 FCC Rcd at 1356.[3]

3. Nevertheless, the ALJ could not consider the proposed settlement because Skywave's erstwhile adversary Tri-State had theretofore raised four issues that went to the heart of Skywave's qualifications, issues the ALJ was obligated by law to resolve before considering the settlement agreement looking toward the takeover of this Construction Permit by "white knight" Walter Threadgill. *See generally Jefferson Radio, Inc. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964). The ALJ added, heard and resolved adversely to Skywave the following four issues at the initial hearing:

> 1. To determine whether Skywave has misrepresented facts it is a *bona fide* two-tiered stock corporation and/or that Ms. Sondra Matthews is the real party in control of the applicant, and, if so, the effect thereof upon its basic qualifications.
>
> 2. To determine whether Skywave is financially qualified to construct and operate the proposed Evansville, Indiana FM Station.
>
> 3. To determine whether Skywave has misrepresented facts or lacked candor in certifying that it is financially qualified to construct and operate the Evansville station and, if so, to determine the effect thereof upon its basis qualifications.
>
> 4. To determine whether Sondra Matthews or Leon Perkinson misrepresented facts or lacked candor in their deposition testimony and, if so, the effect thereof upon the basic qualifications of Skywave.

I.D., 5 FCC Rcd at 1356. The ALJ hence denied Skywave's application. *See id.*, at 1358-61. Skywave, (then) supported by the Bureau, filed exceptions to the *I.D.* with this Board, both claiming that the ALJ had erred grievously in holding Skywave unqualified.

4. Upon review of the record and the exceptions, the Board held:

> The underlying record supports the holding of the ALJ that the ownership structure projected by Skywave was, as we described in our own decision in *Metroplex [Communications, Inc.*, 4 FCC Rcd 8149 (Rev. Bd. 1989), *review denied*, 5 FCC Rcd 5610 (1990), *aff'd mem. sub. nom Southeast Florida Broadcasting Limited Partnership v. FCC*, 947 F.2d 505 (D.C. Cir. 1991)], "a simulacrum intended to exploit artificially the operative mechanics of the Commission's newly relaxed *Attribution of Ownership* policies." We expressly agree with the conclusion of the *I.D.* that, under Issue 1, Skywave has misrepresented that Sondra Matthews was, is, and/or would have been its sole controlling principal.
>
> * * *
>
> Considering the evidence before him, we can find no reversible error in the ALJ's conclusion that, under solid Commission precedent, Skywave was not a *bona fide* two-tiered corporate applicant. Instead, it attempted to callously deploy Sondra Matthews to "subvert[] the underlying intended purpose of [the comparative licensing] process." In light thereof, we cannot find Skywave qualified for the subject construction permit.

Evansville Skywave, Inc., 6 FCC Rcd 5373, 5375-76 (Rev. Bd. 1991) (footnotes and internal citiation omitted) (*Decision I*). In affirming the *I.D.* under its Issue 1, wherein the ALJ had added a discrete and specific misrepresentation inquiry as to Skywave's portrayal of its ownership structure as a *bona fide* limited partnership, the Board believed that the ALJ had properly applied prior agency instruction. *See Metroplex, supra*, 4 FCC Rcd at 8161; Brief For Appellee (FCC) at 15-16 n.6, 44 n.22, *Southeast Florida Broadcasting Limited Partnership v. FCC, supra; see also Kansas Broadcast Limited Partnership*, 4 FCC Rcd 4640, 4641 (1989)(Mass Med Bur. adds issue to determine whether putative "organizational structure is a sham"); *Royce Int'l Broadcasting*, 5 FCC Rcd 7063, 7065 n.6 (1990)(subsequent history omitted).[4] That is, the Board affirmed that Leon Perkinson, *et al.*, who had filed ten other broadcast applications similarly using the Skywave name and organizational formula, *see Decision I*, 6 FCC

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[3] The *I.D.* there explained:

> The parties then said that they would "reform" the agreement and Skywave would have the right to buy out Fed City after Fed City had exercised its option. Skywave would reimburse Fed City for all of its investment and pay Fed City a premium. The addendum, which was filed on April 13, 1990, provided that after Fed City exercised its option, Skywave would have 10 days in which to call Fed City's 49% interest, and seven days to pay for that interest. That interest would be valued at three times its purchase price and double the amount Fed City had provided to build and operate the station. In addition, Skywave would undertake Fed City's obligation to Tri-State. Eventually, the time for payment was extended from seven days to 30 days. The Bureau believed that the 30 day payment time at least made Skywave's option a possibility. The agreement was changed again to provide that Fed City could exercise its option to acquire 51% after the station had "operated" for one year after program test authority was granted, and not later than fifteen months after program test authority. The negotiations for those changes were undertaken by the Bureau and a local citizen of Evansville. All of these facts are a prelude to this hearing which is necessary for the settlement to be effectuated.

Because we agree with the ALJ, and now the Bureau, that Skywave is not qualified to be a broadcast licensee, we need not speculate on whether the "reformed" 1990 agreement is permissible under the Commission's revamped, but yet evolving, settlement policies. *See Tracy A. Moore d/b/a Gifford Orion Broadcasting Ltd.*, 8 FCC Rcd 3577 (Rev. Bd. 1993)(application for review *pending*.)

[4] In that *Royce Int'l* footnote, the Commission had stated:

Rcd at 5374, virtually gave away a 25% interest in this applicant to Sondra Matthews, a person with no broadcast management experience whom he scarcely knew, and then claimed that she was the sole "controlling" partner. *See id.*, 5374-77. Having determined that the ALJ did not err in disqualifying Skywave under Issue 1 of the *I.D.*, it became unnecessary to determine whether Skywave was (redundantly) disqualified under Issues 2-4 at the initial hearing, but the Board did purposefully note the apparent discrepancies between Skywave's witnesses' depositions and their hearing testimony, most particularly over its 1987 financial certification, to wit:

> There is another discrepancy here: though Matthews contended at hearing that she supplied Bank One with financial information (including personal financial data) in 1987, before receiving the original loan commitment, she had earlier declared that she had supplied the bank with only a "sample [loan] letter"; but, *after* a financial issue had been designated against Skywave, Matthews "sent him my own financial statement" and "arrange[d] for the Skywave investors to send the bank their statements." Skywave Exh. 2 at 2-3. We know not which of Matthews' versions is accurate at this point.

Decision I, 6 FCC Rcd at 5375-76 n.6 (original emphasis); *see also id.*, at n.2 ("record would need critical supplementation on the matter of Skywave's financial qualifications" before permit could be granted to Skywave in the first instance). Both Skywave and the Bureau filed applications for review of the Board's *Decision I*.

5. Upon those applications for review, the Commission disagreed with both the ALJ and the Board that Skywave had consciously misrepresented itself as a *bona fide* limited partnership. *Evansville Skywave, Inc.*, 7 FCC Rcd 1699 (1992)(*Remand Order*). Without deciding whether Skywave was, in fact, a *bona fide* limited partnership, *see id.*, at 1701, and allowing that the alleged "general" partner did "exaggerate" her role in attempting claim that she alone had exercised control over Skywave,[5] *see id.*, the Commission could find no intent to deceive. *Id.* Albeit, the Commission was in accord with the Board's *Decision I* that questions pertaining to Skywave's finances would need to be answered; and it further agreed with the Board that, in that critical respect, "the record may require supplementation as to this issue." *Remand Order*, 7 FCC Rcd at 1701. Upon the Commission's remand, and as both it and the Board had anticipated, we found that the then-extant record left open substantial and material questions of fact, so we referred the proceeding to the ALJ for supplemental hearings and a resolution of these vital questions. *Memorandum Opinion and Order*, 7 FCC Rcd 4099 (1992)(Board *MO&O*).

SUPPLEMENTAL INITIAL DECISION

6. The *S.I.D.* under review found against Skywave on all three of the issues designated and tried on remand. *See supra* para. 1. First, the ALJ found that Skywave had supplied no reliable information relating to its Evansville proposal to Bank One, Indianapolis, Indiana prior to affirmatively certifying as to its finances in 1987.[6] And, second, the ALJ found that Skywave, most especially in the person if its putative "general" partner, was unremittingly con-

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In some particularly egregious cases, the record may indicate that an applicant's integration proposal is not only unreliable but contains false statements amounting to disqualifying misrepresentations. *See Mid-Ohio Communications, Inc.*, 5 FCC Rcd 940 (1990) *recon. denied*, 5 FCC Rcd 4597 (1990). When necessary to resolve the case, an appropriate issue will be added and the matter further considered.

[5] In affirming the ALJ's conclusion that Skywave had intended to deceive the Commission that Skywave was a *bona fide* limited partnership under the control of its putatative "general" partner, Sondra Matthews, and not in the control of its prime "limited" partner, Leon Perkinson, the Board had observed, *inter alia*, that:

> the ALJ was here confronted by a coterie of application entrepreneurs claiming to be merely "passive" investors, and who had purportedly placed *exclusive* control of their applicant entity in the hands of a virtual stranger, one with little or no palpable stake in that application, economic or otherwise. In this case, typical of the breed, the allegedly "passive" investors supplied all of the capital, utilized its regular engineers and lawyers, pre-prepared the corporate documents (with a prearranged equity split), whereas the supposedly "active" principal [Matthews] was left with little or no operational function other than those purely *post hoc* ministerial acts associated with certifying the application on behalf of the "passive" entrepreneurs. But in an exaggerated effort to claim that Matthews "controlled" Skywave, Perkinson's stage directions at their first and only pre-filing meeting furnish additional proof of an obvious hoax. At that meeting, Perkinson suggested that Matthews "employ" the engineering firm of Richard Biby, SCC's engineer who had already worked on the Evansville project. Matthews then called Biby from [attorney and also Skywave "limited" partner] Kappes' conference room. Tr. 183-184; 187-88, but she never asked him about costs or fees. Tr. 190. As to Skywave's corporate and communications counsel, Matthews could only say that "I felt that they had become our attorneys when I met them at that place [Kappes' office] when we were introduced to each other," Tr. 180-181, but again she did not inquire about legal fees or payment. Tr. 188-190. Yet, in conflict with her own deposition, Matthews insists that *she* hired Skywave's professionals. *See* Tr. 180-190. The same is essentially true of Matthews' claim to have "arranged" Skywave's bank $400,000 loan. Tr., 214-216.

Decision I, 6 FCC Rcd at 5375 (original emphasis). While not disagreeing with the Board as to any of these matters, the Commission could find no evidence of an intent to deceive as to the roles of Skywave's "partners." *Remand Order*, 7 FCC 2d at 1701.

[6] Inasmuch as we agree with the ALJ and the Bureau that Skywave is not qualified to be a licensee because of its untruthfulness with the FCC, we need not formally decide the *S.I.D.*'s Issue 1 (basic financial qualifications). But to the extent that the Commission's *Remand Order* expressly proclaimed an interest in this issue, *see* 7 FCC Rcd at 1701, and to the degree helpful

tradictory, untruthful or otherwise evasive. *S.I.D.*, 7 FCC Rcd at 29-30. Because we agree with the Bureau that an applicant's truthfulness with the Commission is of cardinal concern, *see* Bureau Reply at 7-10, we review this record in accordance with this agency's *Character Qualifications*, 102 FCC 2d 1179 (1985) (*passim)* (subsequent history omitted), and timeless case law. *See, e.g., Richardson Broadcast Group*, 7 FCC Rcd 1583, 1583-85 (1992)(elderly applicant who misstated her age by 2 yrs. and was otherwise "evasive" not character-qualified), *aff'd per judgment sub nom. Younts v. FCC*, No. 92-1119 (D.C. Cir. May 10, 1993); *Maria M. Ochoa*, 8 FCC Rcd 3135 (1993) (contradictory testimony by principal found disqualifying).

7. *Misrepresentation, Lack of Candor and Evasiveness.* As noted in the Board's *Decision I*, Matthews had testified emphatically at the initial hearing that she had provided personal financial information and a "sample" loan letter to Schlichte, prior to his dispatch of his April 1987 letter to Skywave evincing a tentative "willingness" to lend $400,000 to Skywave. *See supra* para. 4. Given Schlichte's admission that he did not know either the ownership composition of Evansville Skywave or Matthews herself (though he said he expected her personal guarantee on the full loan), Matthews' testimony on this elemental point was key, as Skywave admits it knew. *See* Exceptions at 14-15. Matthews' own deposition testimony had seemed to indicate that *no* financial information had been sent to the bank until several years after her 1987 financial certification. Perkinson also testified that *he* had sent no financial information relating to Skywave, or its principals, prior to Schlichte's letter of April 1987; nor could Schlichte recall receiving any such data and nothing now appears in the bank's records. *See I.D.*, 5 FCC Rcd at 1360-1361; *S.I.D.*, 8 FCC Rcd at 26-30. Upon remand, this point was pursued further and the ALJ heard (8 FCC Rcd at 28; emphasis added):

> After Matthews had testified in response to three sets of questions that she had sent Schlichte financial information about herself, she and her counsel discussed the inconsistency between her testimony and Schlichte's. Skywave Exh. 5 at 3-4. *During the 1992 hearing, she said that all she meant when she represented that she had provided Schlichte with financial information was that she sent him her resume. Id.* at 3. She then said she had not sent Schlichte her personal financial statement. *Id.* at 2. Matthews urged that by telling Schlichte that she owned and ran a newspaper she was indicating something about her financial capability. But she did not tell him in 1987 whether her biweekly newspaper was successful. Tr. 319.

8. The initial hearing record is quite to the contrary. *After* Matthews' deposition was taken, which disposition (in part) led to the financial issue, Matthews was on the stand, *shown* a copy of Schlichte's April 1987 letter and asked:

> Q. Did you provide any financial information to Bank One?
>
> A. *Yes.*
>
> Q. At what point was that?

---

upon any further review, the Board will summarize the many reasons for its declination to grant Skywave's exceptions to, and reverse, the ALJ on his adverse ruling under Issue 1.

Some of the salient reasons are that, although Skywave certified its finances on the basis of an April 27, 1987 letter from Bank One official Anthony P. Schlichte expressing a "willingness" to lend Skywave $400,000 (later increased by letter of March 30, 1990 to $450,000 to help cover the $75,000 cost of buying off Tri-State, *see I.D.*, 6 FCC Rcd at 1358), it appears on this record that: (1) Schlichte, who had known Leon Perkinson and some of his investors from his mid-1980's dealings with Perkinson's Midwest Mobilephone, later indicated an inclination to provide Perkinson with letters for 10 broadcast applications on the loose assumption that most, if not all, of Skywave's broadcast principals were identical to Midwest Mobilephone's; *but* (2) at the time Schlichte issued to Evansville Skywave the subject April 1987 letter, Bank One had no current financial information on Perkinson or his "investors," *see I.D.*, 6 FCC Rcd at 1358-61; *SID*, 8 FCC Rcd at 26-28, Midwest had been sold in 1986, and Schlichte did not know "who's the owners and that kind of thing" about Evansville Skywave, Tr. 292, although Schlichte had told Perkinson that -- as to the 10 broadcast applications -- Perkinson did not have "*carte blanche*" and "that the bank would examine each [Skywave] situation to be sure it was willing to make a loan." *S.I.D.*, 8 FCC Rcd at 26 (quoting Perkinson testimony). Moreover, (3) the bank had no financial information about the putative "general" partner, Matthews (about which a great deal more textually *infra)*, though Schlichte had testified that the bank expected her personal guarantee on the loan, but Schlichte did not know whether Matthews would or could furnish acceptable guarantees or collateral, *see I.D.*, 6 FCC Rcd at 1358; *S.I.D.*, 8 FCC Rcd at 26-30, or whether *any* of any of the *other* "investors" would or could, since he did not know how this Evansville FM facility would be owned. *S.I.D.*, 8 FCC Rcd at 27. Furthermore, (4) while Schlichte's April 1987 letter offered a "willingness" to consider a $400,000 loan, Matthews never advised the bank that only $126,800 would be needed to build the station, and that some or all of the "remainder" would be used for application prosecution costs (even to the extent of the $450,000 *later* sought in 1990 to cover the Tri-State settlement. *See S.I.D.*, 8 FCC Rcd at 26). And, (5) Schlichte, who is no longer with Bank One and "was not orally examined by the Bureau in the 1992 supplemental hearing," *id.*, at 30, had earlier testified that he based his 1987 letter on his memory of a 1983 transaction involving Midwest Mobilephone, *id.*, that he had no financial information on the "controlling" partner Matthews, nor could Leon Perkinson recall providing the bank with any more recent financial data on any of Skywave's "investors." *See I.D.*, 6 FCC Rcd at 1358; *S.I.D.*, 8 FCC Rcd at 26-27. Finally, (6) Matthews could not even recall how much -- $300,000 or $400,000 -- she claims to have originally asked Bank One for as a loan. Tr. 355-57 (quoted *infra* para. 13).

In *Fox Television Stations, Inc.*, 8 FCC Rcd 2361 (Rev. Bd. 1993)(applications for review *pending)*, this Board engaged in an extensive discussion of "accommodation" letters, either from friendly (or even unknown) bank officials, such letters having no substance whatever behind them. *See id.*, at 2419-46 (and cases cited therein). Based on that law and the record here, the Board at present can see no reason to formally upset the ALJ's conclusions found in the *S.I.D.*, 8 FCC Rcd at 30. *Res ipsa loquitur.*

> A. At the time I submitted -- *prior to submitting this letter.*

Tr. 216 (emphasis added). The *S.I.D.* goes on to record a *second* set of questions on that same point (8 FCC Rcd at 27, quoting Tr. 217)(emphasis added):

> Matthews was then shown the March 30, 1990 letter from Bank One and the April 28, 1987 letter from Bank One and asked whether she provided Schlichte with "financial information prior to issuance of this 1987 letter?" Tr. 216. She answered yes. Tr. 217.
>
> Q. What sort [ ] of information did you provide to Bank One?
>
> A. I gave him information about myself, *in terms of my own financial situation*, who I am. *I gave him some estimates on what I thought the costs would be* ....
>
> Q. Was this over the telephone?
>
> A. I sent the information through the mail.

At Tr. 225, and as fully described in Skywave's current exceptions,[7] Matthews was given a *third* opportunity to correct or clarify her previous testimony by her own counsel, who upon re-direct examination queried:

> In getting *the first letter that you got from Bank One, the one back in 1987*, you indicated that you did provide some financial information to Mr. Schlichte, *such as cost estimates. Did you provide a personal financial statement of yours to him?*
>
> [She answered]:
>
> Yeah. Yes. I'm sorry.

Consequently, the *S.I.D.*, 8 FCC Rcd at 29, concluded:

> Matthews claimed in response to repeated questioning during the 1990 hearing sessions that she sent Schlichte financial information. She gave that testimony in response to Bureau counsel's questions and, after a recess, in response to questions by Skywave's counsel. Because her answers were categorical, *her current denial that she sent Bank One financial information in 1987 and her excuse that she only meant in her 1990 testimony that she told Schlichte what her job was when she said she provided him with financial information, amounts to no more than an effort to make her testimony consistent with Perkinson and Schlichte's.* From the presiding officer's observation of Matthews, it is evident she understood the question, the reason for the question, and she deliberately gave the disputed answers. Skywave has not established that there was any truth to her claim whatsoever. Matthews was repeatedly given an opportunity to correct her answer and she did not.

9. Notwithstanding that record, Skywave here asserts[8]:

> Ms. Matthews had stated unequivocally at her 1987 deposition that she did *not* provide Bank One with a personal financial statement. (MMB Ex. 1, pp. 106, 110). Indeed, her testimony as to this fact was one of the basis on which the original motion to enlarge issues against Skywave as a sham applicant was predicated. The ALJ completely ignored this prior testimony. *Since the entire predicate for one of the special issues was the fact (never disputed by Skywave) that she had not submitted a personal financial statement, it is inconceivable that she would have deliberately changed her position radically on the witness stand in contradiction to her own prior account.*

Incredibly, Skywave goes on to insist[9]:

> Skywave contended that, after the *third* time Matthews had unequivocally testified (in response to her own counsel at Tr. 225) that she *had* provided personal financial information (indeed a "financial statement") to Schlichte *prior to* his April 1987 letter, "Matthews consulted with her counsel during a subsequent break in the hearing." Exceptions at 6. After the recess in that initial hearing session, Skywave (with Bureau counsel's acquiescence, *see id.* & n.2; Bureau Reply at 4-5), sought leave of the ALJ to "correct" the "misunderstanding," *see id.*, since Skywave admits that "Matthews ... had *not* provided Bank One with a personal financial statement" in 1987. *Id.*, at 5. Further, Skywave here maintains (*id.*, at 15; emphasis added):
>
> > The disputed questions and answers are entirely consistent with her explanation of her answers. She did provide Mr. Schlichte with financial information about herself including her resume, information about her publishing company, and cost estimates. She did provide Schlichte with a personal financial statement *in 1990*. The question asked her on re-direct [by her own counsel, *see* Tr. 225] could readily be interpreted to have applied beyond the 1987 time period, as she explained.
>
> We, like the ALJ, think not.

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[7] Exceptions at 6 (quoting Tr. 225; emphasis added).

[8] *Id.*, at 14-15 (emphasis added). It may be "inconceivable" to Skywave counsel that witnesses lie at FCC hearings to promote their own application, but it certainly came as no surprise to one candid counsel in a prior case who, after admitting the lies of his client, confessed:

> I don't know why witnesses lie. I've been dealing with them for twenty-five years. They do. Sometimes they lie because they are bitter, because they're protecting a falsehood, because they have something to hide. Sometimes they lie because they're nervous because they perceive a problem in getting a correct answer. I really don't know. I know this, that she explained why she gave the answer....

Broadcast Associates of Colorado, 100 FCC 2d 616, 623 n.9 (Rev. Bd. 1985), *modified*, 104 FCC 2d 16 (1986). But upon review of that case, the Commission believed that the applicant-witness did not *repeatedly* misstate the truth as did Matthews here, which no doubt explains why Skywave's exceptions do not rely upon *Broadcast Associates*. Of course, *unlike* that case, Skywave admits of no dissembling by its nominal "general" partner.

[9] *Id.*, at 15 (emphasis added). Earlier in its exceptions,

Ms. Matthews' direct testimony never asserted that she had submitted a financial statement to the bank. (See Skywave Exs. 1 and 5). Had she intended to somehow renounce her deposition testimony because it was to her advantage, she would have done so in her direct testimony.

10. Skywave's slick intimation that Matthews' initial hearing testimony is either (1) not flatly contracted by her other testimony *or* (2) the product of Matthews' "misunderstanding" (*see supra* note 9) is squarely belied by the record. Its exception arguments are patently a *post-hoc*, contralogical attempt to "unwrite" what Matthews had *thrice* categorically sworn. The following questions and answers at the remand hearing highlight the absurdity of Skywave's defenses:

> [Bureau Counsel]: At the bottom of the page, it indicates you were asked did you provide financial information prior to the issuance of this 1987 letter. *And I think it is pretty clear from the context of the question, if you read the preceding question, that what you were being asked was did you provide financial information to the bank prior to the bank's issuance of its 1987 letter. You answered yes.* Is it your testimony now that that answer was incorrect?
>
> A. I did not provide a financial statement to the bank prior to April 1987.
>
> JUDGE KUHLMANN: But the bank did not ask you for one, either, did they?
>
> BY MR. ZAUNER [Bureau Counsel]: (resumed)
>
> Q. That being the case, why did you answer yes?
>
> A. Well, I was speaking in general terms, not specifically a financial statement.
>
> Q. So, the financial information that you were talking about there was not your personal financial information?
>
> A. No. Only personal to the extent of my profession, and what I was doing, that that would lend some information about my finances.
>
> Q. The next question is what sort of information did you provide to the bank on [Tr.] page 217, the following page? And there you state I gave some information about myself in terms of my own financial situation, who I am. If I understand your testimony now, that answer was not correct? At least in terms of your own financial information; is that correct?
>
> A. What my own financial situation meant was that I had only been a publisher a couple of years, and that was generally what I was talking about. I had not given them any specific financial statements.
>
> Q. For yourself?
>
> A. Of myself.
>
> Q. Let me call your attention to the next page, [Tr.] page 225. It is the very next page in the exhibit, page 15, of Exhibit 5, counting through the attachments. Your counsel there asked you, in getting the *first letter that you got from Bank One, the one [back] in 1987, you indicated that you did provide some financial information to Mr. Schlichte such as cost estimates. Did you provide a personal financial statement of yours to him?* You answered *yeah, yes.* I'm sorry. Was that answer correct?
>
> A. No. It was partly and partly wasn't. The first part was, and the second part did you provide him a financial statement and I said yes to that part. That was incorrect.
>
> Q. Did there come a time when you did actually provide a personal financial statement to Mr. Schlichte; is that correct?
>
> A. Yes.

Tr. at 340-42 (emphasis added). Again, as to Matthews' contention that she "misunderstood" the questions at the initial hearing, the supplemental hearing record reflects:

> [Bureau Counsel]:
>
> Q. Now, after you testified, did you learn at some point that your testimony was incorrect?
>
> A. Yes, sir.
>
> Q. When was that?
>
> A. It was during the break.
>
> Q. Immediately following the testimony?
>
> A. Yes, sir.
>
> JUDGE KUHLMANN: How did you learn that your testimony was incorrect?
>
> THE WITNESS: My counsel asked me some questions about my testimony.
>
> JUDGE KUHLMANN: And you said oh, I answered incorrectly?
>
> THE WITNESS: When he clarified what he was asking me, and I didn't interpret it that way.
>
> JUDGE KUHLMANN: What did he say he was asking you?
>
> THE WITNESS: He said that he was asking me about 1987, and I thought he was asking me about any time.
>
> JUDGE KUHLMANN: *But each time that question was asked to you the date was given.*
>
> THE WITNESS: In the preceding statement, but it's only when you look at it on paper you see that it is in the same question. But when you are here in the hearing room, it could have been two separate statements, questions.

Tr. at 343-44 (emphasis added). The record fully supports the ALJ's determination that Matthews understood perfectly that she was being asked whether she had supplied the bank with personal financial information in April 1987, that "it is evident that she understood the question" in its full import, and that "Matthews was repeatedly given an opportunity to correct her answer and she did not," *S.I.D.*, 8 FCC Rcd at 29, at least until alerted by counsel during a later recess that her initial hearing answers con-

tradicted her deposition.[10] We affirm the *S.I.D.* on this point, and reject Skywave's convoluted "logic." Matthews plainly testified at the initial hearing that, in 1987, she *had* sent financial information about herself and cost estimates, Tr. 217, and not simply her "resume" which contained neither. *See S.I.D.*, 8 FCC Rcd at 28. She even answered her own counsel by affirming that she had sent a "financial statement" in April 1987. Tr. 225. Not only did Matthews dissemble about what information she sent *with* the "sample letter" to Schlichte in April 1987, she lacked veracity about the "sample letter" itself at the remand hearing.

11. Throughout the initial hearing, and for part of the remand hearing, Matthews maintained that in 1987 she sent to Bank One's Schlichte a "sample" loan letter that the bank was, in turn, to send back to Skywave offering it a loan. A purported copy of the sample letter was attached to Matthews' direct written testimony. *S.I.D.*, 8 FCC Rcd at 28. Matthews also testified that the sample letter she sent to Schlichte had been provided to her by Perkinson. Because the sample letter attached to the direct testimony contained a host of unfilled blanks where the essentials of the Skywave broadcast proposal and loan terms were to have been specified, Matthews was questioned on this matter:

> JUDGE KULHMANN: Which of those documents that went to the letter outlined the proposal?
>
> THE WITNESS: *It would have been the sample letter, the bank letter.*
>
> JUDGE KUHLMANN: In that sample bank letter, it explained how much money you wanted to borrow and what you were going to do with it?
>
> THE WITNESS: *No.* It had an estimate, as I remember. I would have to look at it, but my cost --
>
> JUDGE KUHLMANN: No, no. I am just asking what the [sample] letter had in it, that is all.
>
> THE WITNESS. Well, I would have to refer back to the [sample] bank letter.
>
> BY MR. ZAUNER [Bureau Counsel]: (resumed)
>
> Q. The sample bank letter is, I believe, attached to your Exhibit 5, and it is the next page back. Would you take a look at that, please? *Is that the sample bank letter that you sent to Mr. Schlichte that you are referring to on the first page of your declaration?*
>
> A. *Yes, sir.*
>
> JUDGE KUHLMANN: How do you know?
>
> THE WITNESS: Pardon me?
>
> JUDGE KUHLMANN: *How do you know that that was the [sample] letter that you sent to him?*
>
> THE WITNESS: *I have a copy in my files.*

Tr. 321-22 (emphasis added). Matthews next testified that the subject sample letter had been supplied to her by Perkinson. Tr. 323. Matthews further averred to having sent that subject sample letter to Schlichte (along with a short cover letter), but claimed that the cover letter did not outline Skywave's proposal, which data she said appeared *only* in the *sample* letter. She then claimed that she kept no copy of the cover letter. Tr. 322-23.

12. However, the sample letter attached to Matthews' testimony had no outline of any Skywave proposal; rather the critical questions therein had merely *unfilled* blank lines. This perplexed Bureau counsel and the ALJ, both of whom followed up with this series of questions:

> [Bureau Counsel]:
>
> Q. Let me just follow up on what the Judge asked. One question. *Where in pages 6 through 12 [of the Skywave exhibit would one locate your proposal?* You have testified you only provided a very short transmittal cover letter with this information. Mr. Schlichte had asked for your proposal. How did, in your mind, did this represent your proposal, what you sent him, pages 6 through 12?
>
> A. *Well, it is not here.* But the proposal was with a sample letter. *I think in the sample letter I inserted the information on the amount.*
>
> JUDGE KUHLMANN: You mean this *sample* letter attached [to Matthews' direct written testimony] is *not* the letter you sent to Mr. Schlichte?
>
> THE WITNESS: It is not the *cover* letter, no.
>
> JUDGE KUHLMANN: I think we are confused again. We do not want to get confused because last time you say you were confused. I am talking about the *sample* loan letter. That is not what you are talking about. You filled in these amounts for him? I mean, there are all kinds of blanks here. Did *you* fill in the amounts in these blanks when you sent it to him?
>
> THE WITNESS: *I can't honestly recall.*
>
> JUDGE KUHLMANN: Okay. But if we had the *cover* letter, there would be information in that letter would tell us what you told him about your proposal?
>
> THE WITNESS: *I don't think so,* Your Honor.

Tr. 330-31 (emphasis added). Yet, no sooner did Matthews state that she could not recall filling in the blanks of the sample loan letter with the most basic information about the Skywave proposal and loan terms, and when asked where the $400,000 loan figure came from, Matthews responded:

> JUDGE KUHLMANN: Just a second. I want to go back over this again. You have no way of assuring me this is the sample loan letter. Do you remember things about it that made it certain in your mind that this is the sample loan letter?
>
> THE WITNESS: I remember the first paragraph. As I said, I worked on this when I first got it. I can remember doing by hand, *putting in the $300,000.*
>
> JUDGE KUHLMANN: You *did* fill in the letter?
>
> THE WITNESS. *Yes.*
>
> JUDGE KUHLMANN: *When I asked you that, you said you did not know.*
>
> THE WITNESS: *I don't recall saying I didn't know.*

[10] *See* Exceptions at 15-17.

JUDGE KUHLMANN: So, you did fill in the numbers in this letter?

THE WITNESS: In the top paragraph, at some ' point. And I think --

JUDGE KUHLMANN: Wait. At which point?

THE WITNESS: When I was working on it. When I was typing, I think I probably increased the amount.

Tr. 354 (emphasis added). *But see* Tr. 330-31 (quoted above). But that was not Matthews' only contradiction concerning the purported "sample" letter.

13. In other words, despite having fervently testified that the subject sample letter sent to Schlichte was the one attached to her direct written testimony (*see* Skywave Exh. 5), and averring that she was *certain* that the subject letter *was* the one she sent because "I have a copy in my files" (*see supra* para. 11, quoting Tr. 322; *see also* Tr. 350), Matthews did a complete *volte face* when confronted with the subject letter containing only blanks instead of any Skywave proposal or loan data. Bureau counsel attempted to solve the problem created by Matthews' contradictory testimony:

BY MR. ZAUNER [Bureau Counsel]: (resumed)

Q. Back in 1987, did you have in your possession more than one sample loan letter? I am not talking about duplicates of the same one but loan letters that said something different, or did you only have one?

A. I think I recall having -- I think I recall having another sample letter.

Q. Did you receive that letter also from Mr. Perkinson?

A. I think so. Yes, sir.

Q. Did you read both those letters?

A. Yes, sir.

Q. Now, when it came time to send a sample loan letter to Mr. Schlichte, you picked one of the two letters and sent it to him; is that correct?

A. Yes, sir. I didn't pick one of them. I think I made a composite.

Q. JUDGE KUHLMANN: *You retyped the letter, then?*

A. THE WITNESS: *I probably typed it.*

BY MR. ZAUNER: (resumed)

Q. What you [sent] to Mr. Schlichte was a composite of this sample loan letter and another sample loan letter that Mr. Schlichte had sent you?

A. No, sir. Not Mr. Schlichte sent me.

Q. I am sorry. Mr. Perkinson sent you. If I said Schlichte, I made an error. Let me re-ask my question. Then, this sample loan letter was used in conjunction with another sample loan letter? You took the two of them and you combined them, and then you typed that up, and it was that which you sent to Mr. Schlichte?

A. *That's my testimony.*

JUDGE KUHLMANN: So, this particular letter attached is not the letter you sent to Mr. Schlichte?

THE WITNESS: Not in that form.

JUDGE KUHLMANN: Okay. Good enough. Do you have other questions, Mr. Zauner?

BY MR. ZAUNER: (resumed)

Q. *Do you have a copy of the letter that you typed for Mr. Schlichte?*

A. *No, sir.*

Q. But it was not his sample loan letter?

A. No, sir. Not like it is in the [docket] book.

Q. It was a sample loan letter similar to the loan letter?

A. Yes. I know it had the information in the first paragraph of the sample letter that's in this testimony.

Q. In the letter that you typed when you were typing it, did you type in the amount of dollars?

A. Yes, sir?

Q. Do you recall the amount that you typed in?

A. I believe it was $400,000, but I started out a $300,000. *I do not know at what point I increased it to $400,000. I do not recall the time that I did that.*

Tr. 355-57 (emphasis added). Now before the board, her own counsel can only state: "She also sent a draft bank letter ... which she *apparently* fashioned from two samples which she had available." Exceptions at 8 (emphasis added). Does counsel not believe his own client's testimony? As the ALJ reports in the *S.I.D.*, 8 FCC Rcd at 28:

> Matthews said her sample letter for Schlichte did not include language about personal guarantees or repayment. Tr. 364. When it was pointed out that her written testimony said that the letter attached to her testimony is the sample letter she sent to Schlichte (Skywave Exh. 5 at 1-2), she said the statement was "correct in that I think it is a sample, part of the sample. It's not the whole sample." Tr. 365. She then said she did not write her testimony, counsel did. Tr. 367. She did not tell him the sentence was incorrect because she did not realize it. *Id.* Schlichte testified that the letter he sent to Skywave was a prototype letter that he had sent [other Perkinson] entities that were filing broadcast applications. Skywave Exh. 4 at 3.

14. Before the Board, Skywave once again argues: "There was no conceivable reason for Ms. Matthews to lie about whether she had sent Mr. Schlichte a pre-written sample out of two pre-existing sample forms.... Why would she deliberately lie about a point which did not matter in the least?"[11] Skywave continues (*id.*):

> The Commission, of course, has observed that "a willingness to deceive" can be discerned as much from immaterial and useless deceptions as material ones, *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946), but it

[11] Exceptions at 17.

has also held, more recently, that there must be "a logical reason or desire to deceive." (*Garrett, Andrews & Letizia*, 49 RR 2d 1001 (Rev. Bd. 1981)).

15. While departing from the ALJ's conclusion that "Matthews dissembled about filling in the blanks of the sample loan letter" because, in its view, "Matthews' testimony ... does not support a finding that Matthews could not remember whether she filled in any of the blanks,"[12] the Bureau does declare[13]:

> The Bureau, however, does believe that the record establishes that *she intentionally testified falsely that the sample loan letter attached to her written direct testimony was the sample loan letter she sent to Bank One in 1987.*
>
> The record here establishes that Matthews received two different sample bank letters from Leon Perkinson, President of Skywave Communications Corporation, the non-voting shareholder of [Skywave] (Tr. 355). She used these two letters to draft a third composite letter which she personally typed and sent to Bank One's Senior Corporate Loan Officer, Anthony P. Schlichte, along with other information concerning herself and FM construction costs. (Tr. 356). When she sent these documents to Schlichte, she did not keep a copy of what she had sent him. (Tr. 334). Consequently, when the time came to prepare exhibits for this hearing, it was necessary for her to reconstruct what she had sent Schlichte. Rather than admit that she did not have a copy of the bank letter, she claimed in her direct written case that she believed that the attached letter, which was one of the two she had received from Perkinson, was the sample loan letter she had sent to Schlichte. ([Skywave] Exh. 5, pp. 1 and 2). *She affirmed this claim twice in her oral testimony. (Tr. 322; 351-52). This claim was false and she had to know it was false because she had personally composed the sample loan letter that she sent to Schlichte from the two sample letters sent her by Perkinson. She therefore had to know that Schlichte was not sent one of the two sample letters she had received from Perkinson. Moreover, she had to know that the loan letter she attached was not the letter she had sent Schlichte because she had not made copies of the documents she had sent to Schlichte.* Finally, [Skywave's] claim that Matthews' final testimony was consistent with her earlier deposition testimony (when the facts were presumably fresher in her mind), does not explain her unwillingness to tell the truth about this matter at hearing until compelled to do so under cross-examination.

16. As to Skywave's formulation of the law, the Bureau retorts[14]:

> The ability of the Commission to rely on the representations of its licensees is crucial to the functioning of its regulatory process. Thus, the truthfulness and candor of applicants are always in issue and the Commission expects applicants to be candid in Commission proceedings. *William M. Rogers*, 92 FCC 2d 187, 199 91982), *RKO General, Inc.*, 78 FCC 2d 1, 104 (1980), *aff'd RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981). Intentional false testimony during an FCC hearing can lead to disqualification. *RKO General*, 78 FCC 2d at 104. Finally, it is well established that the "fact of concealment may be more significant than the facts concealed." *Character Qualifications*, 102 FCC 2d 1159, 1210 n.77 (1986). Although the motive for Matthews' deception is not readily apparent, the plain fact is that Matthews' oral

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[12] Bureau Reply at 5.

[13] *Id.*, at 7-9 (emphasis added). We do not agree that the record "establishes" that Matthews submitted to Bank One a "third composite" sample letter which contained Skywave's loan proposal. This thesis, propounded originally in Bureau counsel's questioning (*see* Tr. 355-57, quoted *supra* para. 13), is dubious. First, and despite her prior contradictory testimony, Matthews herself could only "think" she recalled a "second" sample letter and "think" she made a "composite" which she "probably" typed (*see id.*); and, second, Skywave itself tries to slip the thesis by saying she "apparently fashioned" a composite. Exceptions at 8. The demonstrative evidence supports no such "composite" thesis. But we do agree with the Bureau that, since *all* of Matthews' multifarious versions of "sample letter" testimony cannot be true, she inarguably lacked candor at one (or more) stages of her testimony. In fact, *nothing* on this record supports Skywave's claim that it submitted in writing the barest details of its proposal (loan amount, *etc.)* to Schlichte, prior to his own April 1987 "loan letter."

[14] *Id.*, at 9. In a footnote 3 to that familiar recitation, the Bureau further submits:

> [Skywave] claims that the *WOKO* has been modified by the Commission's more recent holding in *Garrett, Andrews and Letizia, Inc.*, 86 FCC 2d 1172, 1181 (Rev. Bd. 1981), that "a logical reason or desire to deceive" must be shown. The *Garrett, Andrews and Letizia* case, however, dealt with the standard for addition of an issue. Here, of course, the question is different. The hearing has been held and the existing record must be evaluated to determine whether disqualification is warranted.

Skywave, however, is not incorrect that intent to deceive is a factual question that can be greatly informed by "a motive or logical desire to deceive." *Black Television Workshop of Los Angeles, Inc.*, 8 FCC Rcd 4192, 4198 n.41 (1993)(citing *Calif. Public Broadcasting Forum v. FCC*, 752 F.2d 670, 679 (D.C. Cir. 1985). And, as to motive, the Commission recently opined:

> Given the time and expense entailed in prosecuting a broadcast application, we would expect that all applicants for a construction permit would have a strong interest in being the successful applicant. Thus, the presence of such a motivation ... is of no particular evidentiary significance.

Atlantic City Community Broadcasting, Inc., 8 FCC Rcd 4520 (1993). But anyone doubting that *WOKO* remains good law at the FCC should re-read *Richardson Broadcast Group, supra*, 7 FCC Rcd at 1583 (1992), where the Commission echoed:

> It is well established, however, that the "fact of concealment may be more significant than the facts concealed" because it shows a willingness to deceive the Commission. *Character Qualifications*, 102 FCC 1d 1179, 1210 n.77 (1986). [Footnote citation to *WOKO*.]

and written testimony evidenced a willingness to deceive the Commission. Disqualification is thus warranted. *See FCC v. WOKO, Inc.*, 329 U.S. 223 (1946) (The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones.)

We agree with the ALJ, and the Bureau so far as it goes, that Matthews' testimony about the so-called sample letter was blatantly self-contradictory and a continuation of her pattern of a lack of candor, evasiveness[15] and outright misrepresentation.

CONCLUSION

17. In the Commission's *Remand Order*, it found no intent to deceive as to Skywave's ownership structure, merely a series of "exaggerations" by Matthews. 7 FCC 2d at 1701. Whilst the line between persistent "exaggeration" and disqualifying fabrication may not be brightly illuminated by cursorily consulting certain random precedent, *compare Richardson Broadcast Group, supra, with Broadcast Associates of Colorado, supra*, we agree with the following assessment by the ALJ:

> It was very difficult to ask Matthews a question during the hearing which elicited a reliable answer. For example, she claimed she bought a house with a bank loan. But the more she was questioned, it appeared her mother bought the house and the bank relied only on her mother to pay the loan. There is no question that Matthews' demeanor lacked candor. It is also evident that Matthews understood the questions being asked and that she was knowledgeable about Skywave's proposal. But her answers indicated that she was unsure which answer would best serve her interest. Repeatedly, Matthews was forced into changing her testimony when the inconsistency of her oral testimony with her written and earlier oral statements, and the statements of other witnesses, was called to her attention. The result is that her testimony about what she told Bank One in writing is unreliable.

S.I.D., 8 FCC Rcd at 29. As the Commission intoned in *Broadcast Associates*, an ALJ's findings are entitled to "great weight." 104 FCC 2d at 19. Even the Bureau, which had championed Skywave until it could no longer do so after this latest round, now urges Skywave's disqualification.

18. Faced with a record that is indefensible on substance, Skywave resorts to the low road of attacking the ALJ[16] ; it went so far as to allege the Mass Media Bureau colluded, *ex parte*, with the ALJ to have new Bureau counsel assigned it to this remand hearing.[17] We reject this desperate mud-slinging; the underlying record speaks for itself, even were we to utterly ignore the ALJ's demeanor assessment. Finally, we rebuff Skywave's plea that Matthews' misstatements, contradictions and lapses ought be tempered

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[15] Not only does glaring evidence of Matthews' lack of candor and evasiveness stand out in the transcript excerpts we have hereinabove quoted, the record of her entire testimony is an unending string of backing and forthing, as witness, again, this exchange over whether the sample letter attached to her direct testimony was the letter she sent Schlichte:

> JUDGE KUHLMANN: So, you yourself do not know whether this particular sample loan letter is the one Mr. Perkinson sent to you?
>
> THE WITNESS: *I'm testifying that it is.*
>
> JUDGE KUHLMANN: How do you know? That is what I keep asking you, and you keep saying I have got to take your word for it.
>
> THE WITNESS: I didn't get any information from anybody else at that time.
>
> JUDGE KUHLMANN: How do you know it was not a different sample loan letter? That was 1987. That is five years ago.
>
> THE WITNESS: *I do not know. I do not know what to say.*
>
> JUDGE KUHLMANN: You do not know. That could be *one* thing you *could* answer.
>
> THE WITNESS: *No. I don't know what to answer for your satisfaction.*

Tr. 352-53 (emphasis added). The *S.I.D.*, 8 FCC Rcd at 28 (emphasis added), provides another perfect illustration of Matthews' inconsistency and evasiveness:

> There is another incident in the record which warrants findings because it reflects on the credibility of Matthews. During the 1992 hearing, *Matthews was asked if she ever borrowed money from a bank.* Tr. 335. *She said she had borrowed money in order to buy a house.* Tr. 335. She said the bank may have asked her for some information before they made the loan but they used her mother's credit. Tr. 336. Matthews' response to a series of questions about that transaction illustrates additional evasive testimony.
>
> Q. [The bank] did not ask for any financial information about you at all?
>
> A. I don't recall. They used my mother's [credit].
>
> Q. *Your mother owns the house?*
>
> A. *My mother owns several houses ...*
>
> Q. .... *She owns [your] house or [do] you own it?*
>
> A. *As far as the bank was concerned at that time, she owned it.* Tr. 336.

[16] *See* Exceptions at 2-3; 12.

[17] *See id.*, at 3, where Skywave counsel asserted:

> The ALJ made arrangements on an *ex parte* basis to have new Bureau counsel assigned. (Previous Bureau counsel had recommended that Skywave be found basically qualified.) Thereafter, the ALJ prodded the Bureau to institute further discovery, even though massive discovery had already been undertaken in prior phases of the case.

In its so-called "Erratum," *see supra* para. 1, which the Board Chairman would accept, Skywave retracts the foregoing language, but an *erratum* is not a vehicle for retracting a specious and scandalous charge that should not have been made in the first instance. We shall strike page 3 of Skywave's exceptions, and dismiss its "Erratum" as moot, reminding counsel of the obligations set forth in 47 CFR § 1.52. In that latter regard, we also focus on the discrepancy over Matthews' direct written testimony and the purported sample bank letter appended thereto (Skywave Exh. 5). After all was said and done, with Matthews' contradicting herself that the sworn exhibit contained the *actual* sample letter, she ultimately placed the blame

by its plaint that "she was an inexperienced business person."[18] When it seemed to serve another purpose, Skywave boasts that Matthews is "a leading publisher" who has "controlled" Skywave and was selected by Perkinson (whom she'd met only once before Skywave's filing) because of her "media background." *See I.D.*, 6 FCC Rcd at 1357. Inasmuch as Skywave seems not to believe *itself* on various critical representations, it can ask no more from this agency. The record resoundingly supports the ALJ and the Bureau in their ultimate conviction.

19. ACCORDINGLY, IT IS ORDERED, that page 3 of Evansville Skywave, Inc.'s Exceptions, filed January 27, 1993, and the *Erratum* thereto, filed March 25, 1993, ARE STRUCK; and

20. IT IS FURTHER ORDERED, that the application of Evansville Skywave, Inc. (File No. BPH-870430OK) for a construction permit for a new FM station at Evansville, Indiana IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

for the "error" elsewhere, saying counsel simply created her direct testimony by "reconstructing" what was sent to Bank One. Tr. 366-67. Matthews' representation here explains, perhaps, why despite her perfervid avowals that the sample letter appended to Skywave Exh. 5 was *the* document she furnished Bank One (*see* Tr. 322; 352), counsel can only squeak that the sample letter Matthews (allegedly) sent was "*apparently fashioned*" out of (unavailable) documentary material. Exceptions at 8. "*Apparently*," indeed.

[18] Exceptions at 17. In fact, after finally admitting that she had sent no personal financial data to the bank in 1987, Matthews' represented that she did send her *resume* as solid evidence of "who I am." Tr. 225; *see also* Tr. 340-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-400

In re Applications of

MABLETON BROADCASTING COMPANY, INC	File No. BPH-870706ML
GONZALES BROADCASTING, INC.	File No. BPH-870707MJ
BOLTON BROADCASTING, LIMITED	File No. BPH-870710MD
VOTH BROADCASTING COMPANY	File No. BPH-870710MF
METROPOLITAN MANAGEMENT CORPORATION	File No. BPH-870710MY
LORENZO JELKS	File No. BPH-870710MZ
QRW PARTNERS LIMITED PARTNERSHIP	File No. BPH-870710NF
MABLETON COMMUNICATIONS, LIMITED	File No. BPH-870710NQ

For a Construction Permit for a
New FM Station on Channel 273A
(102.5 MHz) at Mableton, Georgia

ORDER

Adopted: August 16, 1993; Released: September 20, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. By *Order*, FCC 93R-38, released August, 6 1993, the Review Board dismissed the application of QRW Partners Limited Partnership (QRW) for failure to respond to our earlier *Order*, FCC 93R-33, released July 1, 1993, directing the parties to file notices of appearance and associated declarations within fourteen days if they intended to continue the prosecution of their applications in this proceeding. Because the Board received no response from QRW during the requisite period, its application was dismissed pursuant to 47 CFR § 73.3568(b).

2. Now before the Board is a motion to reinstate filed by QRW on August 11, 1993. QRW submits that it duly filed a conforming response to the earlier *Order* and it attaches to the motion copies of its notice of appearance and declaration of QRW general partner Gloria C. Watkins each bearing an FCC date-stamp of July 15, 1993. Although the Board did not formerly receive copies of these materials, it appears that QRW complied with our *Order*, FCC 93R-33, in all respects. Its application will henceforth be reinstated to this proceeding.

3. ACCORDINGLY, IT IS ORDERED, That the motion to reinstate filed by QRW Partners Limited Partnership on August 11, 1993, IS GRANTED, and that the application of QRW Partners Limited Partnership (File No. BPH-870710NF) for a construction permit for a new FM station on Channel 273A at Mableton, Georgia, IS REINSTATED in the captioned proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-159

In the Matter of

Amendment of Section 73.202(b), RM-8240
Table of Allotments,
FM Broadcast Stations.
(Kalispell, Montana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 30, 1993; Released: September 21, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 4083 (1993), issued in response to a petition filed by Cloud Nine Broadcasting, Inc. ("petitioner"), proposing the substitution of Channel 292C2 for Channel 292A at Kalispell, Montana. Petitioner also requests modification of its construction permit (BPH-910926MI) for Station KDBR(FM) to specify operation on Channel 292C2.[1] Petitioner filed comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 292C2 for Channel 292A at Kalispell, since it would provide expanded reception service to the community. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[2] Since Kalispell is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment. In addition, we have authorized a modification of the construction permit for Station KDBR(FM), Kalispell, Montana, to specify operation on Channel 292C2, in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 8, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Kalispell, Montana	246C, 253C, 280C1, 292C2

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station KDBR(FM), Kalispell, Montana, IS MODIFIED to specify operation on Channel 292C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Cloud Nine Broadcasting, Inc., permittee of Station KDBR(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The construction permit for Channel 292A at Kalispell was granted on April 15, 1993, and expires on October 15, 1994.
[2] The coordinates for Channel 292C2 at Kalispell are 48-10-34 and 114-20-53.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-245

In the Matter of

Amendment of Section 73.202(b), RM-8316
Table of Allotments,
FM Broadcast Stations.
(Hayneville, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 31, 1993; Released: September 21, 1993

Comment Date: November 15, 1993
Reply Comment Date: November 30, 1993

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by R. J. Miller ("petitioner") requesting the allotment of FM Channel 300A to Hayneville, Alabama, as that community's first local aural transmission service. Petitioner stated its intention to apply for Channel 300A if allotted to Hayneville, as requested.

2. A staff review of the proposal reveals that Channel 300A can be allotted to Hayneville in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 15.9 kilometers (9.9 miles) northeast of the community.[1]

3. We believe the public interest would be served by proposing the allotment of Channel 300A to Hayneville, Alabama, as an interest has been expressed in providing that community with its first local aural transmission service. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, to include Hayneville, Alabama, as follows:

	Channel No.	
City	Present	Proposed
Hayneville, Alabama	--	300A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 15, 1993,** and reply comments on or before **November 30, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

R. J. Miller
Route 1, Box 242
Letohatchee, AL 36047

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates used for Channel 300A at Hayneville are 32-15-10 and 86-25-56. The site restriction is required to avoid a short spacing to the construction permit issued for Station WWGA(FM), Channel 299A, Georgiana, Alabama, at coordinates 31-38-55 and 86-45-18.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-244

In the Matter of

Amendment of Section 73.202(b), RM-8315
Table of Allotments,
FM Broadcast Stations.
(Pike Road, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 31, 1993; Released: September 21, 1993

Comment Date: November 15, 1993
Reply Comment Date: November 30, 1993

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Fred R. Hughey ("petitioner") requesting the allotment of FM Channel 248A to Pike Road, Alabama, as that community's first local aural transmission service. Petitioner stated his intention to apply for Channel 248A, either individually or as an entity of which he is a part, if it is allotted to Pike Road, as requested.

2. Petitioner states that Pike Road is an unincorporated community, located at the intersection of State Highways 40 and 85, in eastern Montgomery County. Further, petitioner advises that there are road signs on U.S. Highway 231 indicating the direction to Pike Road, and provided a photograph to substantiate his claim. Petitioner also advises that although Pike Road has no local government, it does maintain a volunteer fire department and has a community library, a locally supported softball park, an elementary and a high school, churches and business establishments. Additionally, petitioner states that Pike Road has a post office, its own zip code, and telephone exchange. Among the photographs submitted by the petitioner in support of his proposal were those of several business establishments, the Pike Road Community Club and the Pike Road substation of the "East Montgomery Water, Sewer & F.P.A." Moreover, petitioner advises that the 1990 U.S. Census attributes the Census Division of Pike Road with a population of 4,278 persons. Petitioner also acknowledges that the Rand McNally Commercial Atlas attributes Pike Road with a population of 200 people.[1]

3. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission allot channels "... among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or listed in the U.S. Census, that is sufficient to satisfy its status. In light of the fact that Pike Road is not ascribed with a separate population listing in the 1990 U.S. Census but rather the population attributed to it therein is that of the Pike Road Division of Montgomery County,[2] we believe the petitioner should present the Commission with additional demographic information regarding Pike Road to demonstrate whether it contains other indicia of a community such as a newspaper, social, economic or cultural organizations, municipal services, or governmental units that identify themselves specifically with that locality.[3]

4. We believe the petitioner's proposal to provide Pike Road with its first local aural transmission service, should it ultimately be deemed a community for allotment purposes, warrants further consideration. Therefore, we invite comments on the proposal, as indicated *infra*.

Engineering Analysis

5. Channel 248A can be allotted to Pike Road consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules provided the transmitter therefor is located at least 13.6 kilometers (8.2 miles) southeast of the community at coordinates 32-10-00 and 86-05-00, to avoid a short spacing to Station WZLM(FM), Channel 247A, Dadeville, Alabama, at coordinates 32-52-58 and 85-49-16, and to Station WKKR(FM), Channel 249A, Auburn, Alabama, at coordinates 32-37-19 and 85-30-05, as well as to vacant Channel 250A, Wetumpka, Alabama, at coordinates 32-28-23 and 86-09-22, for which applications are pending.[4]

6. In view of the above, we believe it is appropriate to solicit comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Pike Road, Alabama, as follows:

	Channel No.	
City	Present	Proposed
Pike Road, Alabama	--	248A

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix

[1] Although Pike Road is listed in the Rand McNally *Commercial Atlas*, its mere geographical location is not sufficient to establish "community" status. *See Vimville, Mississippi*, 48 FR 5974 (1983), and *Hannibal, Ohio*, 6 FCC Rcd 2144 (1991).

[2] According to U.S. Census information, a census county division ("CCD") is a geographical area that has been delineated for the purpose of gathering data for inclusion in the Census. Further, the Census Bureau defines a CCD as having no legal function nor is it a governmental unit. Moreover, the boundaries of a CCD are usually delineated to follow visible features and in most cases coincide with census tract or block numbering area boundaries. Additionally, CCD's are named based on a place, county, or familiar local name that identifies its location. *Cf. Hollywood and California, Maryland and King George, Virginia*, 3 FCC Rcd 4043 (1988) (area comprised of collective Census Enumeration Districts "CED's" does not constitute a single community for allotment purposes).

[3] *See, e.g., Ansley, Alabama*, 46 FR 58688 (1981); *Cascade Village, Colorado*, 48 FR 19917 (1983); and *Ellwood, California*, 50 FR 13031 (1985).

[4] In the event the dismissal of two conflicting applications at Wetumpka becomes final, Channel 248A may ultimately be used at Pike Road at a less restrictive site. See File Nos. BPH-921125ME and BPH-921125MG.

and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **November 15, 1993,** and reply comments on or before **November 30, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner and his consultant, as follows:

Fred Randall Hughey
Route 4, Box 247
Tallassee, AL 36078

Kirk A. Tollett
and Commsouth Media Assoc.
4001 Highway 78 East
Jasper, AL 35501
(Consultant to Petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-504

In re Applications of

PLAYA DEL SOL BROADCASTERS — File No. BPH-890501MJ

MICHAEL DURDEN — File No. BPH-890503MP

For Construction Permit for a
New FM Station, Channel 249A,
Mecca, California

MEMORANDUM OPINION AND ORDER

Adopted: September 3, 1993; Released: September 21, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. Playa Del Sol Broadcasters has filed exceptions to the Initial Decision (I.D.) of Administrative Law Judge Arthur Steinberg (ALJ), 7 FCC Rcd 8595 (1992), granting the application of Michael Durden for a new FM broadcast station in Mecca, California. For the reasons set out below, the Review Board will add a hearing issue against Michael Durden to determine whether Durden possesses the financial qualifications to construct and operate his proposed Mecca FM station.

2. *BACKGROUND:* On January 2, 1986, Michael Durden initiated the filing of the Spirit Broadcasting application for Montecito, California. Spirit represented in its application that Durden, the general partner, would own 80% of the equity interest and the two limited partners would each own a 10% equity interest. At the hearing in Montecito held in June and July of 1988, Spirit sought 100% integration credit based upon "Michael Durden's full time participation in the day-to-day activities" of the proposed station. *See Shawn Phalen*, 4 FCC Rcd 5714, 5720 ¶ 67, and 5723 ¶ 117 (I.D., 1989). Spirit was awarded no integration credit by the ALJ in Montecito because the "limited partnership agreement had proven to be a meaningless document that provided no assurance that a viable ownership structure exists". *Id.*, ¶ 124.

3. Although a financial issue had not been designated, the I.D. concluded that Spirit also did not have "a viable financial structure in place". *Id.* The Montecito proceeding was remanded for further hearing, *inter alia*, to determine whether Spirit "falsely certified reasonable assurance of finances in its application", and whether Spirit "is financially qualified to be a licensee." *See Shawn Phalen*, 7 FCC Rcd 623, 628 ¶ 34 (Rev. Bd. 1992). These issues were not resolved in Montecito because the Spirit application was subsequently dismissed pursuant to a settlement agreement. *See Order*, FCC 92M-334, released March 17, 1992.

4. On May 3, 1989, Michael Durden, as an individual, had also filed his application for a new FM station at Mecca, California. As in Montecito, Durden sought 100% credit for proposing to supervise on a full time basis the day-to-day operation of the station. I.D., ¶ 8. After the Montecito application was dismissed, the ALJ in the Mecca proceeding (I.D., ¶ 2) designated an issue:

> To determine whether Michael Durden falsely certified reasonable assurance of finances in the application of Spirit Broadcasting for a construction permit for a new FM station at Montecito, California, and, if so, the effect thereof on his qualifications to become a Commission licensee.

Playa's request that the following issue also be designated for hearing was denied (Playa Br. at p. 4):

> To determine whether, subsequent to May 3, 1989, Durden, as an individual and as the sole general partner of Spirit Broadcasting, has been continuously financially qualified to construct and operate new FM Broadcast Stations at Montecito and Mecca, California.

5. Based on the hearing record, the false certification issue was resolved in Durden's favor. I.D., ¶ 31. In essence, the ALJ found that, in the Montecito proceeding, Michael Durden needed $120,000 to finance his portion of the costs; and that he had spoken to his father, Earnel Durden, who had confirmed that he would loan his son the required $120,000. I.D., ¶ 20. Although the ALJ found that Durden had failed to estimate costs, or obtain reasonable assurance that all the funds needed were available, he could not conclude that "Durden intended to mislead or deceive the Commission". I.D., ¶ 35. Durden was declared the comparative winner because Playa did not seek any integration credit, I.D. ¶ 38, and, even if Durden was awarded no integration credit, he would still prevail because Playa received a decisive diversification demerit based on its sole principal's ownership of the licensee of an FM station in Sacramento, California, and the permittee of an AM station in Burbank, California. I.D., ¶ ¶ 39-40.

6. Playa's *Exceptions*, pp. 14, 23-24, argue that the ALJ erred in not adding a general financial issue against Durden in Mecca. It notes that the Mecca and Montecito applications were concurrently pending from May 3, 1989 until the dismissal of the Montecito application in March of 1992. Durden was required, it argued, to show that he had the financial resources to construct and operate *all* of his proposed stations, citing *Welch Communications, Inc.*, 5 FCC Rcd 4850 (Rev. Bd. 1990), and *Texas Communications L.P.*, 5 FCC Rcd 5876 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 5191 (1991). Thus, Playa states, when the Montecito application was dismissed without resolution of this issue, the ALJ in Mecca erred in not specifying "a general financial issue against Durden which would have encompassed whether Durden possessed the wherewithal to construct both the Montecito and the Mecca applications." *Id.*, p. 23. Playa argues that the failure to hold a hearing on Durden's total financial obligations created an environment where "the ALJ was ruling on Durden's 'good faith' defense [to the false certification issue] in a vacuum." In past cases, it claims, such issues have been resolved only after records were "developed on the actual financial proposals and the

wherewithal of the putative financiers", citing *Welch, supra,* and *Pontchartrain Broadcasting Co.*, 7 FCC Rcd 1898 (Rev. Bd. 1992). *Id.*, p. 24.

7. Durden responds that the cases cited by Playa do not support its request for a general financial issue in Mecca because Durden's financial proposals for Montecito and Mecca were not interrelated, whereas in both *Welch* and *Texas,* the same assets were relied on to fund multiple applications but were insufficient to do so and, in *Texas,* the funding source had reneged on previous financial commitments. Here, by contrast, Durden points out, he was proposing to finance the two applications from different sources. More specifically, Durden responds that: "Durden's plans to finance his Mecca facility with a bank loan are distinct from and independent of his plans to finance the Montecito station and (2) whatever deficiencies led to the specification of a financial issue in the Montecito proceeding did not pertain to what he had done to establish his financial qualifications when he filed his Mecca application." *Reply,* pp. 9-10.

8. *DISCUSSION:* From 1989 until 1992, Durden had co-pending conflicting proposals to participate full time in the management of both the Montecito and Mecca facilities. Nevertheless, because of Playa's decisional diversification demerit, Durden remains the clear comparative winner even if stripped of integration credit for proposing incompatible integration proposals. *See Goodlettsville Broadcasting Co.*, 8 FCC Rcd 57, 59 ¶ 10 (Rev. Bd. 1992). Thus, the only legal obstacle to a grant of Durden's Mecca application is Playa's contention that the ALJ erred in resolving the false certification issue "in a vacuum" without any objective evidence of Durden's financial resources to construct and operate both the Montecito and Mecca proposed stations.

9. The Board has recognized that "multiple filings" raise difficult analytical problems which may justify a "joint test of an applicant's overall financial qualifications." *See, e.g., Texas Communications, supra,* and *Breeze Broadcasting Company, L.P.*, 8 FCC Rcd 1835, 1837 (Rev. Bd. 1993) (applicant unsuccessfully attempted to simultaneously prosecute 72 LPTV, 46 MDS, and 30 cellular applications in addition to FM proposal). As previously noted, *supra,* para. 7, however, Durden argues that the Board need not be concerned in this case because his financial plan for Mecca was "distinct from and independent of his plans to finance the Montecito station." Our review of the fragmentary record regarding this matter reveals that substantial and material questions of fact remain to be resolved before we can fully evaluate Durden's claim.

10. First, the record in Mecca does establish that Durden relied upon a $120,000 loan from his father to finance his portion of the Montecito proposal, ¶ 5, *supra.* To finance the Mecca proposal, Durden relied upon an April 11, 1989 bank letter from the Union Bank of San Diego, California. *Inter alia,* the bank letter required:

> ... the personal guarantees of yourself and your father. In this connection, we have been provided with the personal balance sheets of your father and yourself.

Additionally, Durden's own notes of his meeting with the bank official establish that the bank was concerned about Durden's "knowledge of radio," his plans for the Mecca station, his estimates of costs for the Mecca station, his "experience in radio," and his father's financial condition. *See* Attachment D to Durden's Opposition to Petition to Enlarge Issues filed July 12, 1991.

11. Nothing in Durden's showing suggests that the bank was informed of Durden's outstanding and conflicting proposal to manage the Montecito station full time, or his financial plans to construct the Montecito station with $120,000 from his father. Whether the bank was fully informed of these facts, and whether this information would have had an adverse effect on the bank's willingness to provide a reasonable assurance letter, are unresolved questions. Until they are clarified, we cannot conclude that the Mecca and Montecito proposals are distinct and independent, as Durden claims, and not subject to the general rule that an applicant with multiple filings bears the burden of showing that at the time of certification "he was able to meet all of his other outstanding financial commitments and the present broadcast financial proposal." *Breeze Broadcasting, supra,* 8 FCC Rcd at 1837 ¶ 13. We will, therefore, enlarge the issues and remand the case for a further evidentiary hearing and the adoption of a supplemental initial decision. Since the additional facts we seek are within the special knowledge of Durden, he will bear the burden of proceeding and the burden of proof. *See Heidi Damsky,* FCC 93R-42, ¶ 13, released August 31, 1993.

12. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to Amend filed August 25, 1993 by Playa Del Sol Broadcasters IS GRANTED, and that the amendment is accepted for reporting purposes only, pursuant to 47 CFR 1.65; and,

13. IT IS FURTHER ORDERED, That this proceeding IS REMANDED to the Administrative Law Judge for further hearing and issuance of a Supplemental Initial Decision on the following issue:

> To determine whether Michael Durden is financially qualified to construct and operate the proposed Mecca application for a new FM station.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Part 1 of the
Commission's Rules to
Reflect Procedures for
Providing Documents to the
Commission's Copy Contractor

MEMORANDUM OPINION AND ORDER

Adopted: September 14, 1993; Released: September 22, 1993

By the Managing Director:

1. By this order, we modify the rules pertaining to the filing of petitions seeking the suspension or rejection of new tariff filings or any provision thereof, and the filing of pleadings associated with the petitions.

2. Section 1.773(c) of the Commission's rules[1] currently requires, among other things, that an original and four copies of any such petition or pleading seeking the suspension or rejection of new tariff filings or any provisions thereof be filed with the Commission. To improve service to the public, the Commission is amending this rule to require that all parties filing such documents provide one of the four copies of each petition or pleading directly to the Commission's current copy contractor. The contractor's copy should be directed to:

Copy Contractor
Room 246
1919 M Street, N.W.
Washington, D.C. 20554

This amendment will permit the Commission's copy contractor to provide information to the public in an efficient and expedient basis.

3. The original and remaining three copies of any document shall continue to be filed with the Secretary, FCC, Room 222, 1919 M Street, N.W., Washington, D.C. 20554. In addition, parties shall continue to simultaneously serve separate copies upon the Chief, Common Carrier Bureau, the Chief, Tariff Division, and the publishing carriers or petitioner. *See* 47 C.F.R. Section 1.773(c).

4. Because this is an amendment of rules relating to agency procedure and practice, compliance with the notice and comment and effective date provisions is not required. *See* 5 U.S.C. Sections 553(b)(3)(A); 553(d).

5. ACCORDINGLY, pursuant to the authority contained in Section 0.231(d) of the Commission's rules, IT IS HEREBY ORDERED, that, effective immediately, Section 1.773(c) of the Commission's Rules, 47 C.F.R. Section 1.773(c), is amended, as described herein.

FEDERAL COMMUNICATIONS COMMISSION

Andrew S. Fishel
Managing Director

Amendatory Text

Part 1 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended to read as follows:

Part 1 - PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303: Implement, 5 U.S.C. 552 and 21 U.S.C. 853a, unless otherwise noted.

2. Section 1.773 is amended by revising paragraph (c) to read as follows:

Section 1.773 Petitions for suspension or rejection of new tariff filings.

* * * * *

(c) *Copies, Service.* An original and four copies of each petition or reply shall be filed with the Commission, as follows: the original and three copies must be filed with the Secretary, FCC, Room 222, 1919 M Street, N.W., Washington, D.C. 20554; one copy must be delivered directly to the Commission's Copy Contractor, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Additional, separate copies shall be served simultaneously upon the Chief, Common Carrier Bureau; the Chief, Tariff Division; and the publishing carrier or petitioner.

[1] 47 C.F.R. 1.773(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 22, 1993

Comments Requested on Part 68 Waiver Requests

The Common Carrier Bureau has received separate requests by Communtron Ltd. and Alameda Engineering Inc., to waive certain subsections of Section 68.312 of the Commission's rules:

a. To permit operation of a "line-in-use" status indicator that turns on with a voltage of 9.5 Vdc.

To protect the telephone companies' Automatic Loop Insulation Test (ALIT) operations, Section 68.312(b)(1)(ii) currently requires customer premises equipment to maintain 5 megohms of dc resistance over the on-hook voltage range from 0 to 100 volts. This prevents an indication of a "line fault" at the Central Office, which otherwise would trigger a maintenance action for the telephone company. Petitioners request a waiver of this rule section to permit operation of such circuitry without affecting ALIT operations.

b. To permit automatic detection of and to visually alert the called party of "stutter dial tone" signals which are sent from the central office to notify the called party of a message waiting from CO-based voicemail service.

Currently, users of this service can manually listen for the presence of such signals, Section 68.312(k) (written before the introduction of CO-based voicemail) only allows terminal equipment to leave the on-hook state for the purpose of receiving or making calls, or to program repertory dialers.

Copies of the petitioners' correspondence are available in the Domestic Facilities Reference Room, Room 6220, 2025 M Street N.W., Washington, D.C., Monday through Thursday 8:30-3:00.

Interested parties may file comments within 30 days of the date of this Public Notice. Reply comments are due 15 days thereafter.

Comments should reference this notice and should be directed to:

Olga Madruga-Forti
Chief, Domestic Services Branch,
Domestic Facilities Division,
Common Carrier Bureau,
2025 M Street NW,
Washington, D.C. 20554.

For further information, contact William von Alven, (202)634-1833.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

R & L BROADCASTERS File No. BPH-881011MH

STUART McRAE File No. BPH-881020MB

For Construction Permit
for a New FM Station on Channel 294B1
in Lompoc, California

MEMORANDUM OPINION AND ORDER

Adopted: August 24, 1993; Released: September 22, 1993

By the Commission:

1. The Commission has before it a Petition for Reconsideration, filed September 30, 1992, by R&L Broadcasters ("R&L") of our Memorandum Opinion and Order in *R&L Broadcasters*, 7 FCC Rcd 5551 (1992) (*"MO&O"*). Stuart McRae ("McRae") filed an Opposition to the petition on October 13, 1992, to which R&L filed a Reply on October 27, 1992.

2. In *R&L Broadcasters*, we denied R&L's application for review of a September 13, 1990 action by the Mass Media Bureau denying R&L's request for waiver of the FM spacing rules and dismissing its application for a new FM station in Lompoc, California. We also granted McRae's "queue" application for that facility.[1] R&L raises four arguments in its petition for reconsideration: (i) the Commission "belatedly and arbitrarily refused to consider the merits of a pleading R&L had filed as a supplement to a request for waiver, stating that the supplement was an untimely amendment," Petition, at 1; (ii) as supplemented, R&L's waiver request, as well as its application, is grantable and furthers the public interest; (iii) the staff erroneously began processing McRae's "queue" application before R&L's application had been dismissed; consequently, there was no incentive on the part of the public to file petitions to deny against McRae's application, since R&L's application was "first in line"; and (iv) McRae's proposal contains a patent violation of the FM "line of sight" requirements and thus constitutes inefficient spectrum use.

3. R&L's third and fourth arguments have previously been considered and rejected by the Commission. We have held that R&L "demonstrated no injury from the staff's premature action" in studying McRae's application before R&L's application had been dismissed. 7 FCC Rcd at 5554. Additionally, we noted that, based upon our own study of the information submitted in McRae's application as well as in R&L's petition, the proposal met our city-coverage requirements. *Id.*[2] It is well established that reconsideration will not be granted to debate matters upon which we have already deliberated and spoken. *WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F. 2d 824 (D.C. Cir. 1964).

4. R&L's petition disputes our characterization of its June 23, 1989 "Request for Waiver of Section 73.207 of the Commission's Rules" as an untimely amendment proffered without good cause. As such, we held that it should not have been considered by the staff. In its petition, R&L states that the Commission arbitrarily declared the June 23 document to be an amendment, stating that R&L could not thus circumvent the prohibition on filing amendments after the period for amending as of right simply by styling its late-filed curative amendment a "Request for Waiver." R&L argues that: (i) the June 23 document *supplemented* the December waiver request and did not amend, *i.e.*, "change" the application in any way, but merely provided a more detailed showing as to why waiver was appropriate; (ii) there is no prohibition against applicants supplementing their waiver requests; and (iii) the June 23 document was not intended to be and, indeed, could not constitute an amendment to the R&L proposal, because it was signed by R&L's counsel and not by any R&L principal, as required by 47 C.F.R. §§ 1.52 and 73.3513. Therefore, states R&L, the Commission should reconsider its arbitrary decision to ignore the June 23 "supplement" and reverse its finding that grant of R&L's waiver request was not in the public interest.

5. *Discussion.* Our treatment of R&L's June 23 filing as an "amendment" was proper. Since the adoption of the "hard look" processing rules, waiver requests received subsequent to the filing of the original application have been viewed as amendments. *See Teton Broadcasting Limited Partnership*, 1 FCC Rcd 518, 519 (1986) (applicant whose proposal violated 47 C.F.R. § 73.211 offered "no evidence why it did not [file] *a perfecting amendment containing a waiver request* ... either during the 30-day 'window' filing period ... or the subsequent [period for amending as of right]."") (emphasis added); *see also Pathfinder Communications Corporation*, 3 FCC Rcd 4146 (1988), (all documents in support of a request for waiver of the spacing rules, filed after the filing of the original application, were treated as "amendments" to application.) Furthermore, regardless of how R&L's June 23 filing was captioned, we believe the filing must meet the "good cause" requirement in Section 73.3522(a)(6) of our rules. The June 23 pleading did not meet this test because, *inter alia*, it was purely voluntary. *See Erwin O' Connor Broadcasting Co.*, 22 FCC 2d 140

[1] The filing "window" for the Lompoc allotment opened on July 18, 1988 and closed on August 17, 1988. No applications were filed during the window. However, R&L filed its application on October 11, 1988, and McRae filed his application on October 20. Under the "first come/first serve" processing procedures established in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19,936, 19,941-42 (1985), *recon. denied* 50 Fed. Reg. 43,157 (1985) *"Report and Order")*, R&L's filing became the "lead application" in this proceeding, while McRae's became the first application in the processing "queue."

[2] R&L contends that we permitted McRae to untimely amend his application, because he submitted additional engineering information in his April 16, 1990 "Opposition to Petition to Dismiss or Deny." We emphasize that, as stated in the *MO&O*, we considered only McRae's application and R&L's petition in our analysis; we did not consider any supplemental data. The two applicants were treated similarly.

(Rev. Bd. 1970).[3] Any other result would reward "creative captioning" and undermine the purpose of the "hard look" processing system, which was to expedite service to the public by providing increased efficiency in the application processing system. *Memorandum Opinion and Order* in MM Docket 84-750, 50 Fed. Reg. 43,157 (1985). Under the analysis propounded by R&L, an applicant could file a waiver request, or a self-styled "supplement" bolstering a deficient waiver request, at any time between filing and action on its application. This essentially would render our technical acceptability criteria meaningless and would have nullified the benefits of the "hard look" application processing system.

6. Finally, we disagree with R&L's contention that the December 23 document could not constitute an amendment because it was signed by counsel, not by the applicant. R&L's June 23 filing was not considered because it was an untimely attempt to amend its application unaccompanied by a showing of good cause. Had the amendment been timely filed, however, it would have been returned as defective *because* it did not bear the original signature of the applicant pursuant to Section 73.3513 of the rules.[4]

7. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by R&L Broadcasters IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[3] Furthermore, the filing in this case differed from what are typically referred to as supplemental pleadings, in that supplemental pleadings typically consist of "facts arising since filing of the original." *Black's Law Dictionary*.

[4] *See, e.g., Mary Ann Salvatoriello*, 6 FCC Rcd 4705 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Co.
32 Avenue of the Americas
New York, NY 10013

NAL/Acct. No. 315HF0034

NOTICE OF APPARENT LIABILITY

Adopted: September 14, 1993; Released: September 14, 1993

By the Commission:

I. INTRODUCTION

1. This Notice of Apparent Liability is issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), to American Telephone and Telegraph Co. (AT&T) for apparent violation of Sections 64.710 and 64.711(c) of the Commission's Rules, 47 C.F.R. Sections 64.710, 64.711(c). Section 64.710 limits common carriers to providing pay-per-call services only under the terms and conditions of Sections 64.711 through 64.716 of the Commission's Rules.

2. The appropriate amount of forfeiture for this violation is $75,000.

II. BACKGROUND

3. As part of an enforcement effort to gauge compliance with pay-per-call rules, Commission watch officers employed in the Commission's communications room at 1919 M Street, N.W., Washington, D.C., called 165 pay-per-call 900 numbers during the time period from September 14, 1992, through September 27, 1992. Section 64.711(c) requires that billing for such calls commence only after the caller has a reasonable opportunity to disconnect after the preamble. The watch officers listened to the preamble and immediately disconnected before billing was to begin. Of the 165 numbers, 146 were serviced by AT&T. The Commission was charged for 71 of the calls serviced by AT&T, which is a violation of Section 64.711(c).

III. DISCUSSION

4. AT&T has apparently violated Sections 64.710 and 64.711(c) of the Commission's Rules. The violations were willful and repeated.[1] Thus, an imposition of forfeiture is warranted. The Commission's authority to impose monetary forfeiture penalties for violations of its Rules is contained in Section 503(b), 47 U.S.C. Section 503(b).

5. Under the *1993 Policy Statement, Standards for Assessing Forfeitures*, FCC No. 93-382 (released: August 12, 1993) (*1993 Policy Statement*), the base amount for pay-per-call violations is $75,000.[2] No further adjustments appear warranted.

IV. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), and Sections 64.710 and 64.711(c) of the Commission's Rules, 47 C.F.R. Sections 64.710 and 64.711(c), that American Telephone and Telegraph Co., IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $75,000 for willful and repeated violation of the Commission's Rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47.C.F.R. Section 1.80(f)(3), that AT&T, shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any written response must include a detailed factual statement and supporting documentation. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. The remittance should be marked "NAL/Acct. 315HF0034" and mailed to:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Attn: NAL/Acct. No. 315HF0034
Stop Code 1500E/RAP
1919 M Street, N.W.
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that this notice shall be sent by certified mail, return receipt requested, to AT&T, 32 Avenue of the Americas, New York, New York 10013.

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[1] Section 312(f)(1) of the Communications Act, which also applies to Section 503(b), *see Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991), provides: The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of the Act.

[2] Even if the *1993 Policy Statement* were not applied, we believe the amount of the forfeiture is appropriate under Section 503(b) of the Act. Forfeitures may be assessed against common carriers up to $100,000 per each violation. *See TCI Cablevision of Maryland, Inc.*, 7 FCC Rcd 6013, para. 7 (1992).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 20, 1993

AMERICAN TELEPHONE AND TELEGRAPH COMPANY FILES RULEMAKING PETITION TO ESTABLISH ADDITIONAL STANDARDS FOR EVALUATING STUDY AREA WAIVER REQUESTS, RM-8334

Comment date: October 20, 1993
Reply date: November 5, 1993

On September 3, 1993, American Telephone and Telegraph Company (AT&T) filed a rulemaking petition to establish additional standards for evaluating study area waiver requests. The petition requests that specific criteria be prescribed in the rulemaking. These include: the requirement that the LEC purchasing the exchange(s) submit to the Commission and place on public file an estimate of the impact of that transaction on its eligibility for high cost support and, if applicable, on the amount of additional subsidy it will receive from the Universal Service Fund (USF); the requirement that both the purchaser and seller provide the Commission in a public filing detailed information regarding the value of the exchange assets included in the transaction; and the requirement that the purchaser of an exchange demonstrate the extent to which local rate payers will assume the cost burden of any planned upgrades in service, which otherwise could be borne primarily by access ratepayers contributing to the high cost fund.

Parties may file comments on this petition no later than **October 20, 1993**. Replies should be filed by **November 5, 1993**. Comments should reference RM-8334. A copy of each pleading should be sent to Jacqueline Spindler, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington D.C. Copies are also available from ITS.

For further information contact Jacqueline Spindler at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-96

In re Applications of

SUNBELT, LIMITED PARTNERSHIP	File No. BPH-880308ME
TROY BROADCASTING CORP.	File No. BPH-880310MJ
RALPH W. BLACK, JR.	File No. BPH-880310MT

For a Construction Permit for
a New FM Station on Channel 234A
in Brundidge, Alabama

ORDER

Adopted: September 15, 1993; Released: September 23, 1993

By the Commission:

1. By this action we deny reconsideration of Memorandum Opinion and Order, *Sunbelt, Limited Partnership*, 8 FCC Rcd 753 (1993) (*MO&O*). In that *MO&O*, we affirmed a Review Board decision[1] upholding the determination of Administrative Law Judge Edward J. Kuhlmann to deny the application of Ralph W. Black, Jr. (Black) for a construction permit for a new FM station in Brundidge, Alabama because, *inter alia*, he did not demonstrate he was financially qualified and to grant the application of Troy Broadcasting Corporation ("Troy"),[2] one of two remaining applicants.

2. Black has filed a Petition for Reconsideration of the *MO&O*,[3] claiming that it is based on material mistakes of fact and that it is in conflict with two other recent decisions, *Salt City Communications, Inc.*, 8 FCC Rcd 683 (1993) and *Welch Communications, Inc.*, 8 FCC Rcd 1285 (1993). However, we fully considered previously Black's arguments concerning the factual circumstances underlying his financial certification. We also considered fully his factual arguments concerning the comparative integration credit awarded Troy. We will not grant reconsideration to debate those issues again. *WWIZ, Inc.*, 37 FCC 685 (1964), aff'd sub nom. *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), cert. denied 383 U.S. 967 (1966). Nor do the recent decisions cited by Black present any reason to reconsider our earlier decision.[4]

3. ACCORDINGLY, IT IS ORDERED That, the Petition for Reconsideration filed March 5, 1993 by Ralph W. Black, Jr. IS DENIED.

4. IT IS FURTHER ORDERED, That the Supplement to Petition for Reconsideration filed May 28, 1993 by Ralph W. Black, Jr. IS DISMISSED pursuant to 47 C.F.R. § 1.106(f).

5. IT IS FURTHER ORDERED, That the Motion for Leave to File Supplement filed June 22, 1993 by Ralph W. Black IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[1] *Decision*, 7 FCC Rcd 4394 (Rev. Bd. 1992).

[2] *Initial Decision*, 6 FCC Rcd 5734 (1991).

[3] The Petition for Reconsideration was filed on March 5, 1993. Troy filed an Opposition to the Petition on March 18, 1993. Black filed a Reply on March 30, 1993. Black filed a Supplement to the Petition for Reconsideration on May 28, 1993, Troy filed an Opposition to the Supplement on June 10, 1993, and Black filed a Reply to the Opposition on June 22, 1993. Black also filed a July 13, 1993 Motion for Leave to File Supplement and Supplement. Troy filed an Opposition to the Supplement on July 22, 1993, and Black filed a Motion for Leave to File Reply and Reply on August 3, 1993.

[4] Black argues that *Salt City Communications* and *Welch* require the Commission to conclude that Black had taken adequate steps to determine that his proposed lender could in fact provide the promised funds because those cases indicate that mere "oral assurances" from "a lender with a track record of raising loan funds" are sufficient to establish reasonable assurance from the lender. Black's interpretation of and reliance on these cases is erroneous. In both, we found that an applicant had reasonable assurance of financing when it certified based on receipt of a written commitment from an investment entity formed for the express purpose of promoting minority enterprises and with extensive experience both in evaluating proposals from and providing funding to minorities. On the other hand, the record provides no basis for concluding that Black had reasonable assurance of financing from his proposed individual lender, since he had no objective evidence of the individual's financial means. *I.D.* at 5747 ¶ 48. In May 28 and July 13 Supplements to the Petition for Reconsideration Black also cites *HS Communications, Inc.*, 8 FCC Rcd 3237 (1993), and *Emision de Radio Balmaseda, Inc.*, 8 FCC Rcd 4335 (1993), in support of his case. The May 28 Supplement is procedurally defective and is hereby dismissed pursuant to 47 C.F.R. § 1.106(f). In any event, neither *HS Communications* nor *Emision de Radio Balmaseda* is apposite. Black cites the cases for the proposition that an applicant can rely on oral cost estimates and that he need not have written documentation that he is financially qualified when he certifies. However, Black was disqualified not because his cost estimates were oral or because he did not have contemporaneous documentation, but because his testimony concerning efforts to obtain estimates and reasonable assurance of financing was inconsistent and therefore not credible. 7 FCC Rcd at 4395 ¶ ¶ 7-10.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-107

In re applications of

DAVID A. RINGER	File No. BPH-911230MA
ASF BROADCASTING CORPORATION	File No. BPH-911230MB
WILBURN INDUSTRIES, INC.	File No. BPH-911230MC
SHELLEE F. DAVIS	File No. BPH-911231MA
WESTERVILLE BROADCASTING COMPANY LIMITED PARTNERSHIP	File No. BPH-911231MB
OHIO RADIO ASSOCIATES, INC.	File No. BPH-911231MC

For construction permit for
an FM station on Channel 280A,
in Westerville, Ohio

ORDER

Adopted: September 17, 1993; Released: September 23, 1993

By the Commission:

1. In a Memorandum Opinion and Order released on August 9, 1993, ALJ Walter C. Miller dismissed the application of the Westerville Broadcasting Company Limited Partnership (WBC) at the applicant's request. FCC 93M-510. As he had previously issued a notice of potential forfeiture liability against WBC, Judge Miller forwarded the dismissal order as required by 47 C.F.R. §1.80(g)(3) so as to alert the Commission to the unresolved forfeiture question.

2. In the Memorandum Opinion and Order containing the notice of potential forfeiture liability, which also specified additional hearing issues, Judge Miller held that a substantial and material question had been raised as to whether WBC and its general partner Freeman Edwards had attempted to deceive the Commission concerning WBC's financial qualifications. The specified misrepresentation issue concerned the bona fides of WBC's financial certification, its summary of estimated costs dated December 20, 1991, and representations in an opposition pleading and an attached affidavit filed on June 9, 1993 that Edwards had estimated the cost of operating the proposed station for three months before WBC certified that it was financially qualified and that this cost estimate is accounted for in the December 20, 1991 summary of estimated costs that WBC produced in compliance with 47 C.F.R. §1.325(c)(1). FCC 93M-401, released June 25, 1993.

3. It appears from the pertinent pleadings filed before Judge Miller that the aforesaid representations in WBC's filing of June 9, 1993 were deceitful and hence that WBC is apparently liable for violating the provision of 47 C.F.R. §1.17 that prohibits applicants from making "any misrepresentation or willful material omission" in a written statement submitted to the Commission. Although the forfeiture notice concerns more than one statement in the filing of June 9, the problematic statements can be fairly regarded as component aspects of a single, general representation that Edwards made allowance for three-month operating cost in WBC's summary of estimated expenses. We do not perceive, in the information before us, moreover, a showing sufficient to warrant issuing a notice of potential forfeiture liability for misrepresentation in the financial certification or the summary of estimated expenses. We will therefore specify an apparent liability of $25,000 rather than some multiple of that amount.

4. ACCORDINGLY, IT IS ORDERED, pursuant to 47 C.F.R. §1.80(f) and (g)(3), that unless WBC remits, within 30 days of the release date of this document, a check for $25,000 payable to the order of the Federal Communications Commission and delivered to the Commission at P.O. Box 73482, Chicago, Illinois 60673-7482, the Commission will issue a determination pursuant to §1.80(f)(4) regarding forfeiture liability and, further, that WBC may file a response pursuant to §1.80(f)(3) within that same period of time to show that a forfeiture penalty should not be assessed or that a forfeiture in a lesser amount should be assessed instead.

5. IT IS FURTHER ORDERED that the Acting Secretary of the Commission SHALL SEND a copy of this order by Certified Mail-Return Receipt Requested to:

Freeman Edwards II and
Westerville Broadcasting Company
Limited Partnership
5412 Flintrock Court
Westerville, Ohio 43081

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 90-119

In the Matter of

Florida Public Safety Plan

ORDER

Adopted: September 17, 1993; Released: September 23, 1993

By the Chief, Land Mobile and Microwave Division and the Acting Chief, Spectrum Engineering Division:

1. The Private Radio Bureau and the Office of Engineering and Technology, acting under delegated authority, accepted the Florida (Region 9) Public Safety Plan (Plan) on May 10, 1990, 5 FCC Rcd 3067 (1990).

2. By letter dated June 25, 1993, the Region proposed to amend its Plan. The proposed amendment would revise the current channel allotments. The Commission placed the letter on Public Notice for comments due on August 27, 1993, 58 FR 40818 (July 30, 1993), and received no comments.

3. We have reviewed the proposed amendment to the Region 9 Plan and, having received no comments to the contrary, conclude it furthers the interests of the eligible entities within the Region.

4. Accordingly, IT IS ORDERED, That the Public Safety Radio Plan for Florida (Region 9) IS AMENDED, as set forth in the Region's letter of June 25, 1993. This Amendment is effective immediately.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile & Microwave Division

Lawrence P. Petak
Acting Chief, Spectrum Engineering
Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Steven J. Phillips NAL/Acct. 215FE0166
Sausilito, California

ORDER

Adopted: September 17, 1993; Released: September 23, 1993

By the Field Operations Bureau:

1. This is a response to correspondence dated October 6, 1992, objecting to a $500 monetary forfeiture that was issued by the Ferndale, Washington, field office to Steven J. Phillips. As explained below, we are reducing the forfeiture penalty to $100.

2. Our records show that on June 24, 1992, an employee of the Ferndale Office intercepted transmissions on Marine Channel 28 from a vessel identified as "UHURU, WTS5848." Commission records indicate that WTS5848, was issued to Steven J. Phillips, for use aboard a vessel JASMINE with California registration number CF1744FR, expired on January 22, 1992.

3. On July 24, 1992, the Ferndale Office issued a Notice of Apparent Liability (NAL) for violation of Section 301 of the Communications Act, 47 U.S.C. Section 301, for operating an unlicensed radio station on Marine Channel 28. Mr. Phillips responded to the Notice of Apparent Liability on August 9, 1992. Upon review of the response, the Ferndale Office issued a Notice of Forfeiture for $500 on August 31, 1992.

4. Mr. Phillips feels he should not be liable for the $500 fine because he did not realize that the license was not transferable or that it had expired, and he promptly applied for a new license upon finding that the old license had expired. The operation of the radio without a license is the willful act on which the forfeiture is based.

5. We are unpersuaded by the arguments presented. The Commission has, however, reconsidered the usual amount of forfeiture for this violation. We are reducing the amount to be forfeited in the broad discretion given the Commission to consider the severity of the violation. *See Policy Statement, Standards for Assessing Forfeitures,* 93-382 (released August 12, 1993).

6. Accordingly, IT IS ORDERED, pursuant to Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, and the 1993 *Policy Statement, Standards for Assessing Forfeitures,* FCC 93-382 (released August 12, 1993), that Steven J. Phillips submit the $100 monetary forfeiture payment within 30 days of the receipt of this order. Payment may be by check or money order payable to the Federal Communications Commission. The NAL number 215FE0166 should be placed on the remittance and it should be sent to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-218

In re Applications of

ISIS BROADCASTING GROUP	File No. BPH-880301MG
JOELMART, INC.	File No. BPH-880301MJ
GRAZIANO BROADCASTING COMPANY	File No. BPH-880301NA
PATRICIA WHEELER WODLINGER	File No. BPH-880301ND
CHANEL BROADCASTING	File No. BPH-880301NH
P & T COMMUNICATIONS, INC.	File No. BPH-880301NO
DEBORAH LYNN SCZUDLO	File No. BPH-880301OA
YING HUA BENNS	File No. BPH-880301OE
DELTA BROADCASTING, INC.	File No. BPH-880301OL

For Construction Permit for
New FM Station on Channel 299B1,
Santa Barbara, California

MEMORANDUM OPINION AND ORDER

Adopted: September 15, 1993; Released: September 24, 1993

By the Commission:

I. BACKGROUND

1. This Memorandum Opinion and Order denies review of a decision of the Review Board.[1] *Isis Broadcast Group*, 7 FCC Rcd 5125 (Rev. Bd. 1992), *recon. denied*, 8 FCC Rcd 24 (Rev. Bd. 1992). *See also Isis Broadcast Group*, 7 FCC Rcd 599 (I.D. 1992). The Board's decision granted the application of Delta Broadcasting, Inc. for a new FM radio station in Santa Barbara, California, and denied mutually exclusive applications filed by Isis Broadcasting Group, Joelmart, Inc., Graziano Broadcasting Company, Chanel Broadcasting, P & T Communications, Inc., Deborah Lynn Sczudlo, and Ying Hua Benns.[2]

2. The Board concluded that the choice among the applicants ultimately turned on differences in their proposals to integrate ownership into management. The Board found that Chanel and Sczudlo were not entitled to comparative consideration because they were financially unqualified.[3] 7 FCC Rcd at 5126-30 ¶ ¶ 5-19. Of the remaining applicants, the Board found that only Delta, Joelmart,[4] and Graziano[5]

[1] Before the Commission are: (1) applications for review filed September 14, 1992 by Benns, P & T, Graziano, Isis, Chanel, Sczudlo, and Delta, and January 27, 1993 by Joelmart; and (2) multiple oppositions filed February 11, 1993 by Delta and Joelmart.

[2] The Board dismissed an additional applicant, Santa Barbara Communications, Inc., for failing to file exceptions. Another applicant, Patricia Wheeler Wodlinger, did not seek review of the Board's denial of her application. The denial of her application has thus become final.

[3] Both Chanel and Sczudlo relied on bank letters in certifying their financial qualifications. In each case, however, the record evidence affirmatively indicated that the letter did not reflect the bank's present firm intention to make a loan, future conditions permitting. *See Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 ¶ 2 (1980). Rather, the record showed that in both instances, the bank lacked sufficient information about the applicant to form a present intention. *See Scioto Broadcasters, Limited Partnership*, 5 FCC Rcd 5158, 5160 ¶ 12 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 1893 (1991), *recon. dismissed*, 6 FCC Rcd 4626 (1991).

[4] In their applications for review, Delta and P & T argue that the Commission should not credit the proposed integration of Joelmart's two 50 percent owners, Joel and Eileen Silverman. Joelmart's opponents claim that the Silvermans have not reconciled their integration proposals with the time they would devote to their existing outside business interests. Although Joelmart explains that the Silverman's existing interests would require only three hours a week of their time (Joelmart Exhs. 2 at 2, 3 at 2), the opponents assert that portions of the testimony indicate that the Silvermans' outside obligations would be greater. We agree with the Board and the ALJ (*see* 7 FCC Rcd at 5138 n.50) that the Silvermans adequately supported the limited nature of their outside obligations. A fair reading of their testimony indicates that obligations arising from their current ownership of real estate properties and trust deeds are minimal and that the Silvermans would not seek new business if they receive a construction permit. In particular, Joel Silverman explained, contrary to the claims of Joelmart's opponents, that reducing his outside commitments to three hours a week was not dependent on his selling two existing properties. Tr. 587-90. Eileen Silverman confirmed that she and her husband would not seek additional trust deeds, that they were not actively pursuing additional real estate properties, and that overseeing their current holdings entailed a minimal time commitment. Tr. 651-52.

[5] P & T challenges Graziano's integration proposal, which consists of its 90 percent owner, John Graziano, and its five percent owner, Paul Graziano, as a "sham." P & T asserts that Paul Graziano has been only minimally involved in Graziano's affairs and that he is unlikely to reduce his current involvement in his law practice to effectuate his proposal to serve as the 25 hour a week business manager. Graziano, however, adequately supported Paul Graziano's participation. *See* 7 FCC Rcd at 618 ¶ 177. In any event, even if Graziano were not entitled to credit for Paul Graziano's participation, it would still receive

were entitled to virtually 100 percent integration credit without any offsetting diversification demerit. In this regard, P & T claimed only 50 percent integration credit; Isis, while claiming 100 percent credit, was held entitled to only 25 percent; and, although Benns also claimed 100 percent integration credit, she received a diversification demerit for owning outside media interests. *Id.* at 5138-39 ¶ ¶ 43, 45.

3. The Board found that Delta's proposal was decisively enhanced by local residence and civic activities, and by broadcast experience. 7 FCC Rcd at 5137-38 ¶ ¶ 38-39, 41. Joelmart received less credit for local residence and civic activities and no broadcast experience credit. Graziano, while entitled to broadcast experience credit, received only minimal credit for the more significant local residence factor.[6]

II. DISCUSSION

4. We agree with the Board's grant of Delta's application. We believe, however, that certain points warrant further comment.

5. *Benns diversification demerit.* The Board assessed a slight diversification demerit against Benns based on her ownership of outside media interests. 7 FCC Rcd at 5138-39 ¶ 43. Benns owns a 70.7 percent interest in WFLI, Inc., the licensee of WFLI(AM) in Lookout Mountain, Tennessee, and WFLI-TV in Cleveland, Tennessee. (Her husband owns the remaining 24.1 percent). She is also the licensee of an LPTV station in Chattanooga, Tenessee. An interest as general partner and five percent equity owner of WHYW Associates, the licensee of WMYG-FM in Braddock, Pennsyvania, which was sold after designation for hearing, was also attributed to Benns. 7 FCC Rcd at 611-12 ¶ ¶ 122-23.

6. Benns does not dispute that the demerit she received accurately reflects current Commission policy. She maintains, however, that the Commission should change its policy. Benns first argues that the Commission should not assess demerits based on media interests distant from the proposed community of license. She notes, for example, that, in recently relaxing our multiple ownership rules, we found that local rather than national markets were "primarily" relevant to our diversity concerns. *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2766 ¶ 20 (1992). Benns next argues that she should receive offsetting diversification credit based on her status as a minority (Asian American). Benns contends that minority ownership fosters diversification and that other Commission policies take minority ownership into account regardless of whether it is integrated into management. *See generally Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990).

7. As the Board noted, the Commission rejected an argument similar to Benns' first point in *F.E.M. Ray, Inc.*, 7 FCC Rcd 4606, 4606-07 ¶ 9 (1992). 7 FCC Rcd at 5139 ¶44. There, we found that our diversification policy reflects long-standing and judicially recognized public interest concerns that are still valid. Although we have found that changes in the broadcast marketplace warrant modification of our multiple ownership rules, we do not yet have a basis for finding that these changes warrant altering our comparative policy. Each context involves its own balancing of the interests of diversification and other vitally important considerations to make an overall public interest determination. *See Revision of Radio Rules and Policies*, 7 FCC Rcd at 2756-57 ¶ 3. In our rulemaking, we found that, in light of the *primary* relevance of local markets, we were justified in raising the ceiling on multiple ownership under our rules so as not to prohibit combinations that might serve the public interest. *Id.* at 2765-68 ¶ ¶ 18-23. We made no finding, however, that an applicant's interests outside the market to be served had become irrelevant to the public interest factors underlying diversification. Thus, given two applicants that differ in that one has media interests outside of the market to be served, our most reliable basis for choosing between them remains our traditional judgment that the multiple owner has a slight (but decisionally significant) comparative disadvantage. We will, therefore, continue to apply our current policy to pending cases while we examine in our pending rulemaking whether changes in the broadcast marketplace specifically warrant revision of the diversification criterion. *See Anchor Broadcasting Limited Partnership*, 7 FCC Rcd 4566, 4568 ¶ ¶ 18-22 (1992), *modified*, 8 FCC Rcd 1674 (1993). *See also Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664, 2666 ¶ 21 (1992).

8. With respect to Benns' second point,[7] our current minority ownership policy takes into account the considerations of diversity that Benns cites. *See Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1264-65 ¶ ¶ 8-9 (1982), *aff'd sub nom. West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985). Our practice of treating minority ownership as a factor that enhances an applicant's integration proposal reflects a finding that minority ownership and participation is a relevant factor in determining which applicant will provide the best practicable service to the public. In this proceeding, Benns has been given the benefit of that policy. Although Benns considers our treatment of minority ownership in the comparative context as manifestly inconsistent with other policies, such as the minority distress sale policy, the Supreme Court in *Metro*, which had those policies before it, discerned no inconsistency. *Metro*, 110 S. Ct. at 3009. As discussed in the previous paragraph, we will continue to apply our current policy to pending cases while we examine the overall question in our ongoing rulemaking. *Reexamination*, 7 FCC Rcd at 2667 ¶ ¶ 22-24.

9. *Isis integration.* Isis is a two-tiered corporation with three voting stockholders. Shirley G. Kennedy (12.7 percent), Sylvia Y. Curtis (12.2 percent), and Ione L. Graves (0.1 percent), and one non-voting stockholder, L. Patrick Mellon (75 percent). Isis claims 100 percent credit for the proposed integration of its three voting stockholders.

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credit for John Graziano's active involvement in the proposal. *See Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 ¶ 9 (1990).

[6] We agree with the Board that John Graziano is not entitled to significant local familiarity credit based on market research of Santa Barbara, which he conducted while he resided outside of the community. 7 FCC Rcd at 5138 n.52. As the Board found, such market research is not an activity "indicating a knowledge of and interest in the welfare of the community," as set forth in the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965).

[7] The Board found that this argument raised a policy question that was beyond the Board's jurisdiction. 7 FCC Rcd at 5139 ¶ 44.

10. Administrative Law Judge Edward J. Kuhlmann awarded Isis no integration credit on the grounds that it was illogical to conclude that Mellon would not control Isis. 7 FCC Rcd at 617 ¶ 169. The ALJ found that Mellon had initiated the Isis proposal and recruited Kennedy, who (1) was a stranger to Mellon, (2) had no broadcast experience, and (3) would put up only a small amount of capital. *Id.* at 617 ¶ ¶ 168-69. The ALJ also found that Mellon (who has communications experience) had never previously been a passive investor and that he admitted to Delta's Carol J. Hoffine that he intended to run the station. *Id.* at 616 ¶ ¶ 166-67. The ALJ found that Isis' voting stockholders had little input in the formation of Isis and exercised only nominal functions thereafter. *Id.* at 617 ¶ ¶ 170-71.

11. The Board awarded Isis 25 percent integration credit. Pursuant to *Evergreen Broadcasting Co.*, 6 FCC Rcd 5599, 5600-01 ¶12 (1991), the Board first focused on the record concerning Isis' post-formation activities. In this regard, the Board noted that it was not confident that Mellon would be insulated from the management of Isis, since he kept Isis' voting stockholders on a "tight rein financially." 7 FCC Rcd at 5131-32 ¶ ¶ 24-25. The Board found that Kennedy was compelled repeatedly to request funds from Mellon, accounting to him for the specific purpose of nearly every disbursement. According to the Board, this practice resulted in Isis' checking account being empty most of the time, and making the voting stockholders control of the account illusory. The Board also found that Mellon was not always immdiately forthcoming with funds and that, consequently, Isis was sometimes on the brink of insolvency. Additionally, the Board found that Kennedy had informed Mellon of the options for dealing with an FAA problem and, one one occasion, asked Mellon to deal directly with Isis' attorney. *Id.*

12. Turning to the record as a whole, the Board found that following Isis' formation, Kennedy, and the other voting stockholders, had exercised significant control over Isis, for example by hiring an attorney and engineer, selecting two transmitter sites, and preparing a budget. (In addition, Kennedy had recruited Curtis and Graves). *Id.* The Board discounted Hoffine's testimony that Mellon had admitted to her that he would manage the station. *Id.* at 5133 n.34. Accordingly, the Board treated Mellon as well as the three voting stockholders as active principals and awarded Isis 25 percent credit for the voting stockholder's proposed integration.

13. We find that the Board's analysis of this issue is consistent with the standards set forth in *Evergreen*. Those standards concern two separate questions: (1) whether the applicant will observe the distinction between active and passive owners, and (2) whether the nominally active principals will exercise control over the applicant at all. *See also Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 ¶ ¶ 9-10 (1990), *recon. denied*, 6 FCC Rcd 2601 (1991).

14. In particular, with respect to the first question, we agree with the Board that the record undermines the claim that Mellon will be insulated from the management of Isis despite the language in Isis' stock subscription agreement providing for such separation. Isis Exh. 1, Att. B at 2. We agree with the Board that the showings regarding Kennedy's requests for money to finance the prosecution of the application (and the associated testimony cited by the Board) constitute probative evidence that Kennedy was closely accountable to Mellon and that Mellon was "monitoring" Kennedy. Graziano Exh. 6, Sczudlo Exhs. 2, 4.[8] Additionally, as the Board found, the letter from Kennedy to Mellon concerning the transmitter site matter similarly reflects such "monitoring." Sczudlo Exh. 3.[9] We recognize, as Isis points out, that in some instances communications between the active and passive owners may be acceptable status reports, as in *Coastal Broadcasting Partners*, 7 FCC Rcd 1432, 1434 ¶ 15 (1992). However, we agree with the Board that the relevant evidence here suggests a degree of accountability and monitoring that is inconsistent with effective insulation. In accord with *Evergreen*, such a showing warrants attributing Mellon's interest to Isis and a concomitant reduction of Isis' integration credit to 25 percent.

15. *Delta's integration.* Delta is a two-tiered corporation with one voting stockholder, Carol J. Hoffine (30 percent) and one non-voting stockholder, John P. Franklin, Jr. (70 percent).[10] Delta claims 100 percent credit for the integration of Hoffine.

16. The ALJ gave Delta no integration credit, finding that the record did not support the claim that Hoffine exercised or could exercise control over Delta. 7 FCC Rcd at 620 ¶ 191. The ALJ found that, although Delta was formed in 1988, its principals took no action until 1990 (after designation for hearing) to formally specify that Franklin's stock was non-voting. *Id.* at 619 ¶ 186. The ALJ further found that Hoffine and Franklin did not make definite arrangements as to how the prosecution of the application would be financed and that Franklin was unsure of the extent to which he could be active. (For example, Franklin testified that he might play a role in constructing the station.) *Id.* at 619-20 ¶ ¶ 187-88. Moreover, the ALJ observed that, at the time of Delta's formation, Hoffine and Franklin barely knew each other. *Id.* The ALJ found that Hoffine and Franklin had been brought together by James Evans, Franklin's business partner, who gave extensive guidance to both Hoffine and Franklin. *Id.* at 619-20 ¶ ¶ 187, 189.

17. The Board fully credited Delta's integration proposal.[11] The Board discounted Delta's failure to formally specify the voting rights of its stock until 1990.

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[8] *See Evergreen*, 6 FCC Rcd at 5607 n.24. (limited partner rendered material services to the partnership, since his escrow agent rather than the general partners controlled the payment of bills). *Compare Richardson Broadcast Group*, 7 FCC Rcd 1583, 1590 n.16 (1992) (no showing that limited partners were involved in paying the partnership bills or were using their loans to monitor the management of the partnership or to exert influence over the general partners).

[9] We find no significance in the fact that Isis' voting stockholders apparently requested Mellon, on one occasion, to pay Isis' attorney directly. *See Coastal Broadcasting Partners*, 7 FCC Rcd 1432, 1434 ¶ 17 (1992) (interests of a passive owner who paid bill at the express direction of the nominally active owner not attributed, even though the payment of bills is ordinarily a management function).

[10] Franklin ultimately, after designation for hearing, sold his stock to Thomas P. Moyers, Jr. The analysis of the reliability of Delta's proposal, however, focuses primarily on the relationship between Hoffine and Franklin.

[11] The Board noted that Delta filed two sets of revised excep-

According to the Board, the record indicated that the parties intended from the beginning that Franklin's interest would be passive[12] and that, consistent with Commission precedent, Franklin had not, in fact, taken an active role in corporate affairs.[13] 7 FCC Rcd at 5136 ¶ 34. The Board found that conversations between Hoffine and Franklin concerning the status of the application were limited in scope and therefore consistent with Hoffine's retention of control. *Id.* at 5136 ¶ 35. Additionally, the Board found that Hoffine and Franklin were independently acquainted with Evans and that Evans had no undisclosed interest in the application. *Id.* at 5136-37 ¶ 36. Thus, the Board found no significance to Hoffine's and Franklin's reliance on him (although the Board questioned whether the parties had exercised sound business judgment in forming Delta). The Board emphasized that Franklin, not Hoffine, was vague about the details concerning the applicant, and that Hoffine had exercised initiative in seeking out investors and taken such actions as hiring an attorney and an engineer.

18. As to this issue too, we agree that the Board's analysis comports with *Evergreen*. In making a determination as to whether the nominally active principal will exercise control over the applicant, the Commission looks at several factors. We look first to the record of the parties' activities after formation of the applicant to determine that: (1) the nominally controlling owners do not have either minimal, ministerial roles or defer completely to the purportedly passive owners, who, in turn continue to exercise managerial control; and that (2) the nominally controlling owners formulated or at the very least became familiar with crucial aspects of the applicant's proposal. If the post-formation record does not establish that the nominally controlling owners will exercise exclusive control, we look to the totality of the facts concerning the applicant's pre-and post-formation activities including whether the applicant was formed in a manner that is contrary to sound business judgment. The Commission also looks to factors relevant to whether the passive owner is adequately insulated.

19. Turning first to the post-formation record, Delta points out that Hoffine: (1) hired local and communications counsel and an engineer, (2) established a checking account from which she pays corporate expenses, (3) selected an initial and substitute transmitter site, (4) prepared written cost estimates for construction and initial operation of the station and obtained a bank financing letter, (5) prepared Delta's application, and (6) arranged for the publication of public notice and maintained Delta's public file. Delta Exh. 2 at 2.

20. We find that these activities represent significant managerial control by Hoffine. The record gives no indication that Franklin or his business partner, Evans,[14] participated in the selection of Delta's transmitter sites, although together they own a transmitter site rental business. Tr. 1512, 1533-34, 1544-48, 1556. While Hoffine obtained Delta's bank letter from a bank in which Franklin has an account and Franklin's status as a depositor may have been a factor in the issuance of the letter, there is no indication that anyone other than Hoffine actually participated in obtaining the letter. Tr. 1451-60, 1468-71. Similarly, although Evans provided Hoffine with some initial information on the costs of prosecuting an application, there is no indication that he was involved in preparing the estimates for constructing and operating the station. Tr. 1439-40. The record further indicates that Hoffine retained an attorney and an engineer also used by Evans. Tr. 1445-48, 1450. She, however, named at least one other attorney that she spoke to about representation. Tr. 1450, 1517. Hoffine's post-formation activities distinguish this case from others in which doubts raised about the nature of the nominally active owners' participation undermined their claimed control. *See Fresno FM Limited Partnership*, 6 FCC Rcd 6998, 6999 ¶ 7 (1991), *recon. dismissed*, 7 FCC Rcd 4339 (1992); *Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497, 2498 ¶ ¶ 7-8 (1991); *Metroplex Communications, Inc.*, 5610, 5612 ¶ ¶ 15-21 (1990).

21. To the extent that the above considerations may not be conclusive, it is relevant that, as the Board noted, some aspects of Delta's formation do not appear businesslike.

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tions to correct procedural defects, such as the fact that Delta's original exceptions exceeded the page limit specified in the Commission's rules. 7 FCC Rcd at 5135 ¶ 40. The Board's acceptance of Delta's revised exceptions is consistent with the Commission's practice of permitting parties filing defective pleadings to refile them in proper form. *See Doylan Forney*, FCC 88I-123 (Dec. 13, 1988).

[12] Delta's articles of incorporation, filed February 26, 1988, empowered its board of directors to determine the rights and restrictions with respect to unissued preferred (subseqently renamed Class B common) stock. The articles (as amended) provided that 7,000 shares of Class B were authorized, as compared with 3,000 shares of Class A. Delta Att. A at 2, 5. On April 18, 1988, Hoffine and her attorney, Jonatha Kentro, held Delta's first board meeting and issued 3,000 shares of stock to Hoffine and 7,000 to Franklin. *Id.* at 9; tr. 1420. The same day, the board adopted a resolution prohibiting the holders of Class B stock from participating in the operation or management of Delta's media business. Delta Att. A at 11. These actions, however, did not specifically denominate Franklin's stock as Class B and did not restrict the voting rights of Class B stock. This was not done until after Hoffine's attorney forwarded a draft resolution to that effect (purportedly retroactive to April 18, 1988) to Hoffine on August 21, 1990. *Id.* at 14-16. Nonetheless, the parties behaved as if Franklin's stock was always intended to be non-voting Class B stock. For example, on April 18, 1988, Hoffine elected the board of directors, as Delta's "sole voting shareholder." *Id.* at 12. The minutes of a subsequent meeting on February 24, 1989, refer to Hoffine as "the sole holder of Class A Common Stock". *Id.* at 20.

[13] As the Board correctly noted, the parties' intentions and not legal technicalities are dispositive of this question. *See Cuban-American Limited*, 5 FCC Rcd 3781, 3784 ¶ 21 (1990), *recon. dismissed*, 5 FCC Rcd 7321 (1990). As a related matter, we reject Graziano's contention that a question of misrepresentation or lack of candor has been raised with respect to this matter. Graziano observes that the Board (like the ALJ) rejected Delta's contention that the 1990 resolution restricting the voting rights of Class B stock had existed in 1988 but had inadvertently not been signed at that time. 7 FCC Rcd at 5135-36 n.41. Graziano asserts that Delta had a motive to mislead the Commission by falsely claiming that the resolution existed in 1988. An examination of the record, however, discloses that Hoffine did not claim to have personal knowledge that the document existed in 1988. She merely stated that she was relying on her attorney's statement that the document had been in existence at that time. Tr. 1426-29. The record confirms that Hoffine's attorney did represent to her in an August 21, 1990 letter that the document had existed in 1988. Delta Att. A at 14. Thus, Hoffine's statement provides no basis for a finding that she attempted to mislead the Commission.

[14] Franklin and Evans are each 50 percent owners of a two-way radio company, a pager company, and a site rental company. Tr. 1530-34.

These include: (1) Franklin's failure to investigate Hoffine and her proposal;,[15] (2) the seemingly casual nature of the parties' arrangements for financing the prosecution of the application;[16] and (3) Franklin's sometimes uncertain understanding of the scope of his participation.[17]

22. We agree with the Board, however, that the totality of the circumstances surrounding Delta's formation do not lead to the conclusion that Hoffine had insufficient control over Delta. Most important, the record shows that Hoffine was independently seeking out investors. Isis' Kennedy confirmed that Hoffine sounded her out about joining together in an application and that Hoffine also spoke to Mellon. Tr. 145, 1309-19, 1448; Sczudlo Exh. 7. This factor distinguishes this case from those in which the manifest lack of business judgment surrounding the formation of the applicant ("giving away the store") supported the conclusion that the passive owners had taken the initiative in recruiting the nominally active principal as a figurehead.[18] *See Fresno*, 6 FCC Rcd at 6998-99 ¶ ¶ 5-6; *Poughkeepsie*, 6 FCC Rcd at 2498 ¶ 6; *Metroplex*, 5 FCC Rcd at 5612 ¶ 14. This is especially so, since Hoffine had broadcast experience, including tenure as the general manager of KNJO Radio in Thousand Oaks, California. Delta Exh. 3 at 3. (Thousand Oaks is approximately an hour's drive south of Santa Barbara. Tr. 1311.) Moreover, although Evans was Franklin's business partner, he was also acquainted with Hoffine. The two worked together at station KEYT-TV in Santa Barbara and had occasional social contact after that. Tr. 1438, 1537. The record gives no indication that Evans (who was prosecuting an application for an FM radio station in nearby Montecito, California. Tr. 1445, 1473, 1535) had any interest in Delta or would receive any remuneration. Tr. 1449-50, 1518. Thus, the record supports the Board's conclusion that Hoffine and Franklin each dealt with Evans independently. Indeed, as the Board suggests, the circumstances discussed can be seen as indicating that Franklin, rather than Hoffine, lacked control.[19]

III. ORDERS

23. ACCORDINGLY, IT IS ORDERED, That the applications for review, filed September 14, 1992, by Isis Broadcasting Group, Graziano Broadcasting Company, Chanel Broadcasting, P & T Communications, Inc., Deborah Lynn Sczudlo, Ying Hua Benns, and Delta Broadcasting, Inc., and January 27, 1993 by Joelmart, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[15] Franklin and Hoffine were acquainted in 1977, and possibly earlier, when Hoffine was a broadcast reporter and Franklin worked first at a television station and then became owner of a two-way radio company. Tr. 1441-42, 1536. Between 1977 and 1984, Franklin could recall no contact with Hoffine and Hoffine stated only that she might have "seen" Franklin a couple of times a year. Tr. 1443, 1536-37. Nonetheless, when Franklin learned of Hoffine's interest in applying for a station, he did not get an update on her activities since 1977 and made no inquiry into her background. Tr. 1539-40. Franklin admits that he had no discussion with Hoffine about the potential profitability of the venture or the value of the station and did not negotiate his ownership interest with her. Tr. 1541, 1548.

[16] Hoffine claimed that she and Franklin had a firm oral understanding that he would loan Delta the funds to prosecute its application regardless of the cost and that they had discussed amounts up to $250,000. Tr. 1451, 1473, 1486. Hoffine admitted, however, that there had been no discussion of notes to document the loans or of a repayment schedule. Tr. 1451, 1486-87, 1491-92. (Franklin was reimbursed $7500 when he withdrew as a stockholder. Tr. 1518, 1520.) Franklin, on the other hand, testified that, while he "assumed" that he would fund the application based on his conversations with Evans, he had never discussed the matter with Hoffine and had no understanding of whether the funds he advanced would be treated as a loan or a capital contribution. Tr. 1541-43, 1545-46. He also testified that he had made no decision about advancing funds in excess of $100,000. Tr. 1545-46. He did not provide Hoffine with a personal balance sheet. Tr. 1472, 1548.

[17] Much of Franklin's testimony confirms his understanding of the passive nature of his interest. He testified that based on his conversations with Evans that he could have no role in prosecuting the application, selecting a transmitter site, or constructing the station. Tr. 1546-47, 1556. He also stated that he was not interested in being involved in broadcast management and viewed the venture strictly as an investment. Tr. 1557-58. He said that he had not been involved in prosecuting the application (beyond suggesting to Hoffine that his son might photocopy some information at the library for her). Tr. 1515-16, 1549, 1555. He admitted, however, that he recalled no discussion with Hoffine about his noninvolement beyond a "casual mention." Tr. 1546-47. He also stated that he had been only 99 percent (not 100 percent) sure that his stock was non-voting. Tr. 1552. At one point, Franklin suggested that he had made no decision as to whether he would construct the station. *Id.*

[18] Hoffine testified that she had learned of the availability of the Santa Barbara frequency in the newspaper. Tr. 1437. According to Hoffine, Evans later called her and asked her about the frequency, telling her about Franklin's interest when she asked Evans about potential investors. Tr. 1437-39, 1443. Franklin testified that Evans told him that Hoffine was looking for an investor. Tr. 1535.

[19] As to the issue of Franklin's insulation, we note, as did the Board, that Hoffine admits to discussing the application with Franklin on perhaps a dozen occasions. Tr. 1509. These discussions included Hoffine's requests for money, the relative strengths of the other applicants, the need to relocate Delta's transmitter site, and the possibility of settlement. Tr. 1510-13. Unlike the case of Isis, however, there is no indication that these discussions were more than status reports or that they involved a similar degree of accountability and monitoring.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 24, 1993

COMMON CARRIER BUREAU ANNOUNCES NEW HOURS FOR THE FILE ROOM LOCATED IN THE POLICY AND PROGRAM PLANNING DIVISION

The Policy and Program Planning Division of the Common Carrier Bureau will change the hours of operation for its File Room located in Room 544. Effective October 1, 1993, non-docketed material will be available for public inspection Monday through Friday during the hours of 9:00 a.m. to 12:00 p.m. and 1:30 p.m. to 4:30 p.m.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 24, 1993

PUBLIC INFORMATION COLLECTION REQUIREMENT SUBMITTED TO OFFICE OF MANAGEMENT AND BUDGET FOR REVIEW

The Federal Communications Commission has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1980, 44 U.S.C. § 3507. Persons wishing to comment on this information collection should contact Jonas Neihardt, Office of Management and Budget, Room 3225 New Executive Office Building, Washington, D.C. 20503, (202) 395-4814. For further information, contact Judy Boley, Federal Communications Commission, (202) 632-7513.

Please note: The Commission has requested expedited review of this collection by October 1, 1993 under the provisions of 5 C.F.R. § 1320.18.

Title: Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141.

Action: New collection.

Respondents: Business or other for-profit.

Frequency of response: One-time collection with each required tariff filing.

Estimated Annual Burden: 16 responses, 15 hours average burden per response; plus occasional fresh look public notice filings, with *de minimus* burden per response.

Needs and Uses: In the *Second Memorandum Opinion and Order on Reconsideration* in CC Docket No. 91-141 (released September 2, 1993), the Commission reconsidered *de novo*, and adopted a modified version of, the "fresh look" policy adopted in the *Special Access Order*, 7 FCC Rcd 7369 (1992), in that docket. The September 2 Order also clarified and expanded earlier Commission requirements concerning the neutral application of nonrecurring charges, modified the requirements for tariffing virtual collocation arrangements, and specified certain standards that must be met for a carrier's connection charge rate structure to be considered reasonable. The Order requires local exchange carriers (LECs) to make tariff filings to provide public notice of the start of the "fresh look" period at each of their offices where expanded interconnection is implemented. LECs must also file tariff revisions to implement the modified fresh look rules. LECs must make tariff revisions to bring their tariffs into compliance with the requirements concerning nonrecurring charges no later than October 18, 1993. LECs must revise their connection charge tariffs if they do not satisfy the standards set forth in the Order. Finally, LECs may choose to revise their virtual collocation tariffs to reflect the less extensive tariffing requirements adopted on reconsideration.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

DANBURY CELLULAR TELEPHONE CO.
(Assignor)

HORIZON CELLULAR TELEPHONE CO. OF CENTRAL KENTUCKY, L.P.
(Assignee)

For assignment of Station KNKN939 in the Domestic Public Cellular Telecommunications Service on Frequency Block A, in Market 450, Kentucky 8 - Mason — File No. 01853-CL-AL-1-93

For assignment of Station KNKN666 in the Domestic Public Cellular Telecommunications Service on Frequency Block A, in Market 447, Kentucky 5 - Barren — File No. 01854-CL-AL-1-93

For assignment of Station KNKN940 in the Domestic Public Cellular Telecommunications Service on Frequency Block A, in Market 448, Kentucky 6 - Mason — File No. 01892-CL-AL-1-93

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 1993; Released: September 24, 1993

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Danbury Cellular Telephone Company (Danbury) was granted construction permits for the above-captioned nonwireline rural service area (RSA) cellular markets in Kentucky. Danbury has filed applications for consent to assign the captioned licenses to Horizon Cellular Telephone Company of Central Kentucky, L.P. (Horizon). Petitions to deny the applications were filed by Tsaconas Cellular, Inc. (Tsaconas) and by Vivian E. Warner (Warner), which Danbury and Horizon opposed. For the reasons stated below, we grant the assignment application and dismiss the petition filed by Warner.[1]

II. DISCUSSION

2. Warner's petition is defective because she fails to establish standing, the petition does not contain specific allegations of fact, and the petition does not include the required affidavit. Under Section 309(d) of the Communications Act of 1934, as amended (Act), a formal petition must contain "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent [with the public interest]", supported by affidavit for those facts for which official notice may not be taken, sufficient to show that the petitioner is a "party in interest." *See* 47 U.S.C. § 309(d)(1). *See also* 47 C.F.R. § 22.30(a)(3). In order to be a party in interest to a cellular assignment application, a petitioner must establish that the assignment "would result in or be reasonably likely to result in, some injury of a direct, tangible, or substantial nature." *Brian L. O'Neill*, 6 FCC Rcd 2572, 2574 (1991) (quoting *Teleprompter Corp.*, 87 FCC 2d 521, 537 (1981), *aff'd*, 89 FCC 2d 417 (1982)). Warner makes no attempt to identify any palpable injury that would result from the proposed transfer of Danbury's licenses to Horizon; thus, standing is not established. Moreover, Warner does not include an affidavit with the petition. On these bases alone, Warner's pleading is subject to dismissal.

3. Further, Warner does not plead with the specificity required under the statute and our rules. Warner contends that the Commission cannot rule on the assignment application because Horizon has failed to provide its corporate by-laws which, she claims, will identify the limited partners that will control the above-captioned cellular markets.[2] While the application contains names of the officers and directors of Horizon, Warner argues that none of the partners of its majority shareholder is revealed. Therefore,

[1] Pursuant to Section 22.927 of the Commission's Rules, 47 C.F.R. § 22.927, Tsaconas, Horizon, Danbury, and cellular systems bordering the named Kentucky markets, entered into a settlement agreement disposing of certain court proceedings and relevant proceedings before the Commission. As a part of this agreement, Tsaconas withdrew its petition to deny the captioned application and its reply to the opposition of Horizon. Horizon withdrew its opposition to the petition to deny and Danbury withdrew its comments in support of Horizon's opposition. In response, Warner filed an "Addendum to Petition to Deny and Request for Hearing," asking that the Commission either deny or designate the application for hearing because the agreement raises real party-in-interest matters and violates the public interest. Danbury responds that Warner's addendum is a sham pleading filed to "extract a pay-off." Danbury argues that a real party-in-interest allegation is relevant only to an undisclosed interest in an application, not a license, citing *Brian L. O'Neill*, 6 FCC Rcd 2572 (1991). Warner's addendum suffers from the same defect as its petition to deny. Warner has failed to establish standing, its allegations are not specific, and the addendum does not include an affidavit. Furthermore, a review of the agreement by Division staff reveals no violation of Commission Rules.

[2] Warner also contends that no action should be taken on Danbury's application because there is pending before the Commission an application for review of the dismissal of Warner's cellular applications and a request to revoke the licenses of two cellular operators. However, Warner has provided no legal support for this request. Pendency of an application for review is not a basis for withholding action on the present application, and Warner's court appeal has been denied. *See Vivian E. Warner*, 6 FCC Rcd 6033 (1991), *aff'd Warner v. FCC*, No. 90-157 (D.C. Cir. Mar. 17, 1993).

Warner asserts, the Commission does not know who will be in control of the Kentucky markets. Warner also alleges that the alien ownership of Horizon and its owners is not disclosed, except to note that Brentwood-Horizon (general partner for the limited partnership) has an approximate 8.25 percent alien ownership. Warner has failed to cite a rule violation or provide any authority requiring the Commission to review the Partnership Agreement of Horizon's general partner. Notwithstanding Warner's contentions to the contrary, Horizon has identified the entities that control it in Exhibit A to Form 430 of the FCC Assignment Applications, including all relevant information on alien ownership. Moreover, the Commission has previously approved the ownership structure of Horizon's parent company in another application. *See* Application to Transfer Control of Horizon Cellular Telephone Company of Bedford, FCC File No. 04232-CL-TC-1-92, granted March 16, 1992.

4. Warner also argues that we should delay action on the assignment applications until the Commission concludes an investigation of AT&T's proposed investment in McCaw Cellular Communications, Inc., (McCaw) a subsidiary which indirectly owns approximately 12.16 percent of Horizon.[3] There is no investigation of the proposed transaction involving AT&T and McCaw. Further, any questions concerning the recently-filed application to transfer control of McCaw to AT&T will be addressed in that proceeding. *See* Public Notice on AT&T and McCaw Cellular Communications, Inc. Consent for Proposed Merger, DA 93-1119 (released September 15, 1993).

5. Warner further contends that the assignment cannot be approved until Danbury resolves all dBu contour incursion disputes with neighboring cellular companies. Once again, Warner cites no legal authority for this contention. Indeed, as Danbury notes, those cases involve routine disputes over minor dBu contour extensions into two neighboring RSAs and there is no requirement under the cellular rules that assignment applications cannot be granted until incursion disputes are settled. In any event, the settlement agreement among Danbury, Horizon, and neighboring cellular companies resolves the contour extension disputes. *See* note 1, *supra*.

6. Finally, Warner suggests that the Commission review materials submitted by Horizon to the Kentucky Public Service Commission, because these materials contain information not submitted in its assignment application. The above-captioned assignment application has been reviewed and the information contained therein supports grant of the application.

III. CONCLUSION AND ORDERING PARAGRAPHS

7. We find that Horizon is qualified to be a licensee and approval of the assignment application will serve the public interest, convenience, and necessity under Section 310(d) of the Act. We therefore dismiss Warner's petition to deny the assignment application of Danbury and Horizon. We grant the assignment application filed by Danbury.

8. Accordingly, IT IS ORDERED THAT Vivian E. Warner's petition to deny Danbury Cellular Telephone Co.'s application to assign its authorization for Station KNKN939 in Market 450 (Kentucky 8 - Mason), Station KNKN666 in Market 447 (Kentucky 5, Barren), and Station KNKN940 in Market 448 (Kentucky 6 - Mason) all on frequency block A, to Horizon Cellular Telephone Company of Central Kentucky, L.P., IS DISMISSED.

9. IT IS FURTHER ORDERED THAT the application filed by Danbury Cellular Telephone Co., seeking consent to the assignment of its cellular licenses for Station KNKN939 in Market 450 (Kentucky 8 - Mason), Station KNKN666 in Market 447 (Kentucky 5, Barren), and Station KNKN940 in Market 448 (Kentucky 6 - Mason) all on frequency block A, to Horizon Cellular Telephone Company of Central Kentucky, L.P., IS GRANTED.

10. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 of the rules or applications for review under Section 1.115 of the rules may be filed within thirty days of the date of public notice of this Order. *See* 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division

[3] *See* FCC Public Notice, Rpt. No. CL-93-47 (Jan. 29, 1993); Erratum (Jan. 29, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Cheyenne Corporation File No. 2895-CM-P-83

For Multichannel Multipoint
Distribution Service station WHT668
on the F-group channels at
Charlotte, North Carolina.

MEMORANDUM OPINION AND ORDER

Adopted: August 13, 1993; Released: September 24, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* Cheyenne Corporation (Cheyenne) requests reinstatement of its cancelled Multichannel Multipoint Distribution Service (MMDS) construction authorization, station WHT668, on the F-group channels at Charlotte, North Carolina, pursuant to Section 21.44 of the Commission's rules. Cheyenne also requests a waiver of the Section 21.44(b)(1) thirty (30) day filing period for reinstatement petitions.

2. *Background.* After its application was selected by Commission lottery and underwent qualification review, Cheyenne was granted a construction authorization on February 18, 1987. On its face, the construction authorization specified a eight month construction period with an expiration date of October 18, 1987. On or before this date, Cheyenne was required to notify the Commission that it had completed construction of its station or request an extension of time to construct. Cheyenne failed to take either action. Consequently, consistent with Section 21.44(a) of the rules, Cheyenne's construction authorization was forfeited and it was directed to submit the authorization for cancellation.

3. *Petition.* Cheyenne filed its petition for reinstatement on December 17, 1987, approximately two months after its construction authorization had expired. Consequently, Cheyenne requests waiver of the Section 21.44(b)(1) thirty (30) day filing period for reinstatement petitions, arguing that it had no previous notice as to the expiration of its construction authorization. Cheyenne states that, during this period, the law firm representing it had dissolved and Cheyenne had recently changed its address. Cheyenne, further, argues that, during this same period, the Commission revised its rules extending the construction period for MMDS stations from eight to twelve months, and that Cheyenne believed the new construction period rules applied to its station.

4. Regarding reinstatement, Cheyenne states that, if its construction authorization is reinstated, it will diligently proceed to complete construction of the station. Concerning the establishment of procedures to ensure timely filings,[1] Cheyenne states that it has implemented such procedures, including retention of a new law firm that closely monitors all Commission correspondence with Cheyenne. In its petition, Cheyenne also requests additional time to construct.

5. *Discussion.* Cheyenne's construction authorization expired automatically, without further action by the Commission, on October 18, 1987. 47 C.F.R. § 21.44(a). The Commission's rules permit an applicant to file a petition for reinstatement of a forfeited authorization within thirty days of expiration, but Cheyenne did not meet this deadline. 47 C.F.R. § 21.44(b)(1). In support of a waiver of the thirty filing period, Cheyenne has attempted to make a showing that it had no notice of the expiration of its construction authorization.

6. Cheyenne's showing is not sufficient to justify a wavier of the thirty day filing period for reinstatement petitions. A waiver may be granted, under Section 21.19, upon an affirmative showing either that the underlying purpose of the rule would be frustrated, if not waived, or that the unique facts and circumstances of a particular case render application of the rule inequitable or unduly burdensome, and that there is a lack of reasonable alternatives.

7. Cheyenne has made neither of these showings. The purpose of the rule is to provide for a thirty day period during which the former authorization holder can appeal the automatic forfeiture.[2] During this period, other parties that file for the vacant frequencies do so at their own risk.[3] But, if no reinstatement petition is filed during that period, the rule is also intended to ensure other parties who are willing and able to provide service that there is a date certain after which they may file applications for areas covered by an expired authorization without being challenged and displaced by the former authorization holder. To allow the late filing of reinstatement petitions, as requested by Cheyenne, would make that certainty an impossibility and would eviscerate one of the purposes of this rule. *See Superior Broadcasting Corporation*, 7 FCC Rcd 7543 (1992). Nor has Cheyenne offered any unique facts or circumstances that would make operation of the rule inequitable in this case. In addition, Cheyenne's waiver request did not demonstrate a lack of reasonable alternatives.

8. We are unpersuaded by Cheyenne's claim that it had no notice of the expiration date of its construction authorization. The expiration date was expressly provided on the face of the authorization. In addition, Cheyenne had the burden to make the necessary arrangements to assure that Commission documents or correspondence would promptly reach it or some person authorized to act in its behalf. 47 C.F.R. § 1.5(b). Thus, any delays in filing the petition for reinstatement attributable to delays experienced by Cheyenne's attorney in the forwarding of its mail, or due to Cheyenne's change in address, is insufficient justification for grant of the waiver. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. 1988). Nor can Chey-

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[1] *See* 47 C.F.R. §21.44(b)(3).
[2] *Notice of Purposed Rulemaking*, Docket No. 20490, 40 Fed. Reg. 24021 (June 4, 1975).
[3] *In the Matter of Revision of Part 21 of the Commission's Rules*, 2 FCC Rcd 5713, 5718 (1987).

enne rely on its unsupported belief that the Commission had extended its construction period from eight months to twelve months. Cheyenne's construction authorization expired on October 18, 1987, well before the effective date of the new rules that established a new construction period of twelve months for MMDS conditional licensees.[4] Consequently, Cheyenne did not make an affirmative showing as required by Section 21.19 to justify waiver of the thirty day filing period for reinstatement petitions. Due to Cheyenne's failure to comply with this filing deadline, dismissal of its petition for reinstatement is warranted.[5]

9. *Conclusion and Ordering Clause.* Having carefully considered all of the arguments and evidence presented, we find that Cheyenne automatically forfeited its construction authorization for failure to construct prior to the specified expiration date, and that reinstatement of its construction authorization is not justified. We further find that Cheyenne's petition for reinstatement was late filed and it's request for waiver of the filing deadline is also not justified. Accordingly, IT IS ORDERED that Cheyenne's petition for reinstatement IS DISMISSED and its request for waiver of Section 21.44(b)(1) IS DENIED. This order is issued pursuant to 47 C.F.R. § 0.291, and is effective upon release. *See* 47 C.F.R. §§ 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[4] The new rules became effective on November 9, 1987. *See Revision of Part 21 of the Commission's Rules,* 2 FCC Rcd 5713, 5729 (1987).

[5] Even if the petition for reconsideration had been timely filed, it would be denied. In its petition, Cheyenne did not present any circumstance that prevented it from filing an extension of time prior to the expiration date of its construction authorization. 47 C.F.R. § 21.44(b)(2). Moreover, Cheyenne failed to file an application for extension of time, FCC Form 701, with its petition, and to make a showing of due diligence demonstrating any actions undertaken to initiate or pursue construction during the construction period. *See Microband Corp. of America,* 50 Rad. Reg. 233, 235 (Comm. Car. 1981).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Lynch Corporation

Petition for Waiver of Section
61.41(c) of the Commission's Rules

ORDER

Adopted: September 20, 1993; Released: September 21, 1993

By the Acting Chief, Common Carrier Bureau:

1. On June 21, 1993, Lynch Corporation (Lynch) filed a petition for waiver of Section 61.41(c) of the Commission's rules[6] in conjunction with its acquisition of J.B.N. Telephone Company (JBN). The rule waiver would: (1) allow JBN to be regulated under rate of return principles instead of price cap principles; (2) place JBN in the National Exchange Carrier Association (NECA) pools; and (3) allow Lynch to avoid the application of price cap regulation to itself for interstate services. NECA filed supporting comments on July 30, 1993. No oppositions to the petition were filed. For the reasons discussed below, we grant the waivers to the extent indicated.

2. Lynch states that, by contract dated May 13, 1993, Lynch Corporation VI, a subsidiary of Lynch, agreed to purchase all outstanding stock of JBN from GTE Corporation (GTE) and its subsidiary Contel Corporation. JBN serves approximately 2,300 subscribers in 13 exchanges in northeastern Kansas. Lynch currently owns five other local exchange carriers, serving approximately 8600 access lines.[7]

3. Lynch asserts that forcing its cost-based subsidiaries to leave the NECA pools and convert to price caps and compelling JBN to remain under price cap regulation would imperil their financial viability, effectively preventing Lynch from proceeding with the purchase.[8] Lynch contends that its purchase of JBN will result in immediate improvements in the efficiency and capabilities of JBN's facilities, including upgrading to digital switches linked by fiber facilities. According to Lynch, these improvements will enable the provision of services such as equal access and CLASS (customized local access signaling services) and will improve access to information services and ISDN.[9] Lynch asserts that a grant of the waiver requested would be consistent with the policies underlying Section 61.41(c) because there will be no opportunity for cost shifting between GTE's price cap LECs and Lynch's rate of return LECs, and because GTE will not be able to return JBN to price cap regulation. Lynch also states that it cannot feasibly elect price caps.[10] Finally, Lynch requests that its petition be acted upon by October 25, 1993 so that it may meet its objective of closing the transaction by October 31, 1993.[11]

4. In support of Lynch's waiver request, NECA asserts that the grant is in the public interest and will benefit consumers.[12] NECA further states that the transaction will have a *de minimis* effect on the NECA pools, and will impose no significant administrative burden on NECA.[13]

5. The Commission's rules governing mergers and acquisitions provide that when a rate of return company and a price cap company merge, or when one company acquires the other, the resulting company must file tariffs pursuant to price cap regulation within a year of the transaction.[14] In the absence of the rule a company might attempt to shift costs from its price cap affiliate to its rate of return affiliate, allowing the rate of return affiliate to earn more (because of its greater revenue requirement) while generating greater earnings for the price cap affiliate without triggering the sharing mechanism. Also, if a LEC were allowed to alternate between rate of return regulation and price cap regulation, it could "game the system" by building up a large rate base under rate of return regulation, then opting for price caps which rewards carriers for making efficiency gains.[15] The Commission stated, however, that "in some cases, the efficiencies created by the purchase and sale of one or two exchanges may outweigh the threat of gaming the system. Such cases might justify a narrow waiver of the all-or-nothing rule."[16]

6. We conclude that this is the type of transaction, involving the purchase of a small number of access lines, for which the Commission anticipated granting narrow waivers. We further conclude that there is good cause to grant petitioner a waiver of Section 61.41(c) and (d) of the Commission's rules to permit JBN to avoid price cap regulation under its new ownership.[17] The first concern identified by the Commission in adopting these rules -- cost-shifting between affiliates -- is not at issue here. Lynch is not seeking to maintain separate affiliates under different systems of regulation. The second concern underlying the rules -- allowing a company to use mergers and acquisitions as a means of "gaming the system" -- is also not raised in this case. GTE will remain regulated under price caps; it retains no ownership over JBN that would permit it to convert the property back into price cap exchanges. In

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[6] 47 C.F.R. § 61.41(c).
[7] Lynch Petition at 2-3.
[8] *Id.* at 4-5.
[9] *Id.* at 6-7.
[10] *Id.* at 8-9.
[11] *Id.* at 11-12.
[12] NECA Comments at 2.
[13] NECA Comments at 3.
[14] Section 61.42(c)(2) of the Commission's Rules, 47 C.F.R. § 61.42(c)(2). Policy and Rules Concerning Rates for Dominant Carriers, *Second Report and Order*, 5 FCC Rcd 6786, 6821 (1990) and *Erratum*, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.*, 6 FCC Rcd 2637 (1991), *petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *further modified on recon.*, 6 FCC Rcd 4524 (1991) (*ONA/Part 69 Order*), *appeals of LEC Price Cap Order affirmed sub nom., National Rural Telecom Association v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).
[15] *See LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2706.
[16] *Id.* at n.207.
[17] Lynch requests waiver of Section 61.41(c). We also grant waiver of Section 61.41(d) on our own motion.

addition, Lynch has stated its intention not to elect price caps, stating that it will remain under rate of return regulation.[18]

7. Further, the Commission has always been sensitive to the administrative burdens imposed on small carriers by the application of Commission rules.[19] In the *LEC Price Cap Order*, the Commission recognized that small telephone companies should not be forced into a regulatory regime that was designed largely on the basis of historical performance by the largest local exchange carriers.[20] The Commission therefore made price cap regulation optional for smaller carriers. Given the Commission's reservations about mandatory application of the price cap plan to carriers other than GTE and the Regional Bell Operating Companies, our application of the all-or-nothing rule must take into account the Commission's concerns about applying the price cap system to small carriers.

8. We therefore grant Lynch a waiver of Section 61.41 (c) and (d), which allows the property purchased by Lynch to become subject to rate of return regulation. Because Lynch does not serve more than 50,000 access lines, it does not require a waiver of Section 69.3 to re-enter the NECA pools.[21]

9. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 4(i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, that the petition of Lynch Corporation for waiver of Sections 61.41(c) and (d) of the Commission's Rules, 47 C.F.R. § 61.41(c) and (d), IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

[18] Lynch Petition at 4-5 (arguing that price cap regulation would subject JBN to unnecessary economic risks and regulatory burdens, would be contrary to Commission policy and would effectively prevent completion of the transaction).

[19] *See, e.g.*, Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation, Report and Order, CC Docket No. 92-135, 8 FCC Rcd 4545 (1993), *petitions for recon. pending;* and Regulation of Small Telephone Companies, CC Docket No. 86-467, Notice of Proposed Rulemaking, 2 FCC Rcd 1010 (1986); Report and Order, 2 FCC Rcd 3811 (1987); Order on Reconsideration, 3 FCC Rcd 5770 (1988).

[20] *LEC Price Cap Order*, 5 FCC Rcd at 6818.

[21] *See* 47 C.F.R. § 69.3(g)(2).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 20, 1993

COMMISSION ANNOUNCES TENTATIVE SELECTEES FOR INTERACTIVE VIDEO AND DATA SERVICE (IVDS) LOTTERIES

On September 15, 1993, the Commission conducted a lottery for the purpose of determining the tentative selectees for nine IVDS markets first announced in a Public Notice, DA-93-935, on July 23, 1993, 58 Fed. Reg. 40427 (July 28, 1993).

In accordance with the Commission's Rules concerning random selection procedures, 47 C.F.R. § 1.972, this Public Notice is issued to announce the tentative selectees for the nine markets.

As indicated in 47 C.F.R. § 1.972(d), the Commission will grant the applications of those tentative selectees that are determined to be qualified to receive licenses under 47 C.F.R. Part 95, Subpart 95 of the rules. Tentative selectees have two days from the date of this Public Notice (that is, by 4:30 PM EST, September 22, 1993) to submit the required Form 574 and related showings to the following address: Federal Communications Commission, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325-7245, ATTENTION: IVDS LOTTERY. For further information, see Public Notice, DA-935 (July 23, 1993), or contact the Consumer Assistance Branch, 717-337-1212.

The following are the 18 tentative selectees for the nine IVDS markets:

Market	Tentative Selectee	Lottery ID Number
New York, NY/NJ		
Frequency A	Ronald E. Dowdy	185
Frequency B	Cristina Del Valle	170
Los Angeles, CA		
Frequency A	Bay Interactive Ventures	041
Frequency B	Alberto Garza	167
Chicago, IL		
Frequency A	Vinod K. Sood	442
Frequency B	Self Communications	431
Philadelphia, PA		
Frequency A	WHF Inc.	477
Frequency B	Kingdon R. Hughes	187
Boston, MA		
Frequency A	Santos De Hoyos	340
Frequency B	Brian Berson	046
San Francisco, CA		
Frequency A	ITV, Inc.	184
Frequency B	Raveesh K. Kumra	220
Washington, D.C.		
Frequency A	IVD Company	183
Frequency B	J & M Partnership	194
Dallas, TX		
Frequency A	Legacy TV, Inc.	222
Frequency B	Maritime Communications Corp	235
Houston, TX		
Frequency A	Luz Lobaton	220
Frequency B	Anthony J. Benison	042

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLTEL Service Corporation

Petition for Waiver of
Section 61.41(c) of the
Commission's Rules

ORDER

Adopted: September 17, 1993; Released: September 21, 1993

By the Acting Chief, Common Carrier Bureau:

1. On May 14, 1993, ALLTEL Service Corporation (ALLTEL) filed a petition for waiver of Section 61.41(c) of the Commission's rules.[1] ALLTEL seeks a waiver of this rule section in order to remain under rate-of-return regulation after acquiring certain telephone exchanges in Georgia from subsidiaries of GTE Corporation, which currently are subject to price cap regulation.[2]

2. According to ALLTEL, grant of its waiver petition would not undermine the purposes of Section 61.41(c) because the policy concerns that 61.41(c) addresses are not raised by this transaction. Specifically, ALLTEL states that it lacks the ability to shift costs between price cap and rate of return affiliates,[3] or to "game" the price cap system.[4] ALLTEL also states that grant of its request would serve the public interest because the planned acquisition of the Georgia exchanges, which are contiguous with existing ALLTEL exchanges, will allow it to realize substantial efficiencies concerning its Georgia exchange service.[5] On June 21, 1993, the United States Telephone Association and the National Exchange Carrier Association filed comments in support of ALLTEL's petition.

3. In support of ALLTEL's petition, USTA asserts that ALLTEL's operative characteristics and relatively small size are ill-suited for price cap regulation. Specifically, USTA contends that the productivity factor would not necessarily reflect the productivity gains of ALLTEL.[6] USTA also states that ALLTEL will be able to recognize substantial economic and operational efficiencies in Georgia.[7] NECA argues that the burdens and expenses associated with forcing ALLTEL companies to adopt price cap regulation outweigh the benefits of permitting ALLTEL to remain under rate of return regulation.[8]

4. The Commission's rules governing mergers and acquisitions provide that when a rate of return company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[9] Absent such a rule, a company might attempt to shift costs from its price cap affiliate to its rate of return affiliate, allowing the rate of return affiliate to earn more (because of its greater revenue requirement) while generating greater earnings for the price cap affiliate (*i.e.*, without triggering the sharing mechanism). Also, if a LEC were allowed to go back and forth between rate of return regulation and price cap regulation, it could "game the system" by building up a large rate base under rate of return regulation, then opting for price caps which rewards carriers for making efficiency gains.[10]

5. We conclude that there is good cause to grant petitioners a waiver of Section 61.41(c) and 61.41(d) of the Commission's rules. The first concern identified by the Commission in adopting these rules -- cost-shifting between affiliates -- is not at issue here. ALLTEL is not seeking to maintain separate affiliates under different systems of regulation. The second concern underlying the rules -- allowing a company to use mergers and acquisitions as a means of choosing regulatory systems and "gaming" -- is also not raised on the facts in this case. The Georgia study areas that will be acquired by ALLTEL will be subject to rate of return regulation, and ALLTEL states that it has no intention of electing price cap regulation for its operations.

6. Further, in the *LEC Price Cap Order*, the Commission made price cap regulation optional for carriers smaller than the largest eight. The Commission recognized that smaller companies should not be forced into a regulatory regime that was designed based largely on the historical performance of the largest local exchange carriers.[11] Given the Commission's reservations about mandatory application of the price cap plan to carriers other than GTE and the Regional Bell Operating Companies, our application of the all-or-nothing rule must take into account the Commission's concerns about applying the price cap system to smaller carriers. Although the property being acquired and ALLTEL are substantially larger than those for which waivers of the rule have been granted, the size of ALLTEL resulting from the transaction will still be significantly smaller than the eight LECs for which price caps is man-

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[1] 47 C.F.R. § 61.41(c).

[2] Pursuant to agreements between ALLTEL and GTE, GTE will assign all of its exchange assets in Georgia to ALLTEL, and ALLTEL will assign all of its exchange assets in Illinois, Indiana and Michigan to GTE and pay approximately $440 million.

[3] ALLTEL Petition for Waiver at 5-6.

[4] *Id.* at 6.

[5] *Id.* at 6-7.

[6] USTA Comments at 4.

[7] *Id.* at 6.

[8] NECA Comments at 3.

[9] Section 61.42(c)(2) of the Commission's Rules, 47 C.F.R. § 61.42(c)(2). Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, 6821 (1990) and Erratum, 5 FCC Rcd 7664 (1990), *modified on recon.*, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*).

[10] *See LEC Price Cap Reconsideration Order*, FCC Rcd 2637, 2706.

[11] Policy and Rules Concerning Rates for Dominant Carriers, *Second Report and Order*, 5 FCC Rcd 6786 (1990) and *Erratum*, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.*, 6 FCC Rcd 2637 (1991), *petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *further modified on recon.*, 6 FCC Rcd 4524 (1991) (*ONA/Part 69 Order*), *appeals of LEC Price Cap Order affirmed sub nom., National Rural Telecom Association v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

datory. Therefore, it is consistent with the rationale of the *LEC Price Cap Order* to allow price cap regulation to remain optional for ALLTEL.

7. Given all of the circumstances raised in this case, we find that it is in the public interest to grant a waiver of the all-or-nothing rule. Our waiver of Section 61.41 (c) and (d) allows the Georgia exchanges to become subject to rate of return regulation.

ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §4(i), and Section 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91, 0.291, that the Petition for Waiver of ALLTEL Service Corporation, for waiver of Section 61.41(c) and (d) of the Commission's Rules, 47 C.F.R. §61.41(c), IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

NURSERY INDEPENDENT SCHOOL DISTRICT
Victoria, TX — File No. BPLIF-910820DB

EDNA INDEPENDENT SCHOOL DISTRICT
Victoria, TX — File No. BPLIF-911113DD

For Construction Permit and License in the Instructional Television Fixed Service on Channels C1, C2, C3, and C4

MEMORANDUM OPINION AND ORDER

Adopted: September 15, 1993; Released: September 24, 1993

By the Commission:

1. The Commission has before it for consideration the mutually exclusive applications of Nursery Independent School District ("Nursery") and Edna Independent School District ("Edna"), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on channels C1-C4 in the area of Victoria, Texas.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of Nursery and Edna. Both applicants are qualified to be ITFS licensees. Nursery and Edna are school districts, accredited by the Texas Education Agency, that are applying to provide ITFS service to enrolled students at schools within their respective jurisdictions.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523 (Second Report and Order)*, 101 FCC2d 49, 65-72 (1985); 47 C.F.R. §74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, Nursery and Edna are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being a school district engaged in the formal education of enrolled students at schools within its jurisdiction.

Accreditation. Each applicant, accredited by the Texas Education Agency, is entitled to three points for accreditation.

Four-Channel Limitation. Neither Nursery nor Edna is the licensee of, or has filed applications for, additional ITFS channels in the Victoria, Texas area. Consequently, each is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992). Nursery's illustrative schedule proposes an average of 24.375 hours of ITFS programming per channel per week. However, the schedule does not indicate which programs are formal educational or those to be delivered to enrolled students for credit, as required by Section IV, Question 5 of the application. Accordingly, we will treat this programming as nonformal for the purposes of determining merit points. *Valley View Independent School District*, 7 FCC Rcd 7228 (1992). Further, its programming grid proposes an average of 4 hours of formal educational programming per channel per week. Because neither the amount of program-

[1] A "local" applicant is an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order*, 101 FCC2d at 59; 47 C.F.R. §74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of total ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

ming specified in the schedule nor that in the grid reaches the threshold at which merit points are awarded, Nursery is entitled to no programming merit points.[3]

Edna's illustrative schedule, as timely amended, indicates an average of 41.5 hours of formal educational programming per channel per week. Further, its programming grid indicates 41 hours per channel per week of formal educational programming. Edna is therefore entitled to two programming merit points.

E- and F- Channel Group Relocation. Neither Nursery nor Edna is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

Total. Nursery is entitled to four points for being local, three for being accredited, and two for observing the four-channel limitation, for a total of nine points. Edna is entitled to four points for being local, three for being accredited, two for observing the four-channel limitation, and two for proposing at least 41 hours per channel per week of formal educational programming, for a total of eleven points. Accordingly, the tentative selectee is Edna.

OTHER MATTERS

5. Edna proposes to lease its excess capacity for non-ITFS use as permitted by Section 74.931 of our Rules and has submitted a copy of its lease with United States Wireless Cable, Inc., which does not, however, entirely conform to the Commission's requirements. First, the term of the lease specified in Section 1 of the Airtime Lease Agreement extends beyond the ten-year period permitted by our Rules. *See Instructional Television Fixed Service in Gen. Docket 90-54 and 80-113*, 5 FCC Rcd 6410, 6416 (1990). Second, Section 12 of the lease properly provides for the licensee's right to purchase the ITFS equipment at its fair market value in the event that the lessee elects to terminate the Agreement without cause. Section 11(c) of the lease, however, does not provide this option in the event of the lessee's uncured breach of the Agreement. We have consistently maintained that the licensee be permitted the opportunity to purchase the ITFS equipment necessary to maintain its operation in the event of any action on the lessee's part which would terminate the Agreement, and the applicability of this requirement to Section 11(c) of the Agreement should be made clear. Neither of these provisions reflects adversely on Edna's basic or comparative qualifications, nor does their presence preclude grant of an authorization. Nevertheless, Edna's authorization will be conditioned upon conformity of the lease to Commission requirements. *Milwaukee Regional Medical Instructional Television Station, Inc.*, 2 FCC Rcd 142, 143 (1987).

6. There are no petitions to deny Edna's application, and we find Edna to be fully qualified and that a grant of Edna's application will serve the public interest, convenience, and necessity.

7. Accordingly, IT IS ORDERED, That the application of Nursery Independent School District (BPLIF-910820DB) IS DENIED, and the application of Edna Independent School District (BPLIF-911113DD) IS GRANTED, subject to the condition that within 30 days of the release of this Order Edna submits to the Chief, Distribution Services Branch for approval information demonstrating compliance with Commission requirements, including, if appropriate, an amended lease agreement conforming in the manner discussed herein.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[3] Since the grid does propose some formal educational programming, however, Nursery meets the basic programming requirements of Section 74.931(a) of our Rules, 47 C.F.R. §74.931(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

TRINITY EPISCOPAL SCHOOL VICTORIA, Victoria, TX — File No. BPLIF-910820DE

REGION 3 EDUCATIONAL SERVICE CENTER Victoria, TX — File No. BPLIF-910820DC

For Construction Permit and License in the Instructional Television Fixed Service for Channels D1, D2, D3, and D4

MEMORANDUM OPINION AND ORDER

Adopted: September 15, 1993; Released: September 24, 1993

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Trinity Episcopal School Victoria (Trinity) and Region 3 Educational Service Center (Region 3) for a construction permit and license on Channels D1-D4 in the Instructional Television Fixed Service (ITFS).

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of Trinity and Region 3. Both Trinity and Region 3 are qualified to be ITFS licensees. Trinity is an educational organization accredited by the Southwestern Association of Episcopal Schools applying within its jurisdiction to provide ITFS service to its own students and those in neighboring communities. Region 3 is an educational organization accredited by the Texas Education Agency, applying within its jurisdiction to provide ITFS service to its own students and those in neighboring communities.[1]

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of 12 merit points based on five criteria deemed to be most relevant in selecting which applicant would be best qualified to provide the service for which the ITFS spectrum has been established. *ITFS Second Report and Order in MM Docket No. 83-523*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[2] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[3] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the greatest number of points.

4. Under this comparative selection process, Trinity and Region 3 are awarded points based on the following criteria:

Localism. Trinity and Region 3 are each entitled to four points because they are either a school serving its own students or a school district having one or more receive sites within its district.

Accreditation. Trinity is accredited by the Southwestern Association of Episcopal Schools of Victoria, Texas. Region 3 is accredited by the Texas Education Agency. Consequently, both Trinity and Region 3 are entitled to three points for being accredited.

Four-Channel Limitation. Neither of the applicants is the licensee of other ITFS facilities or is applying for additional channels other than the ones requested in the instant applications. Consequently, both applicants are entitled to two points for remaining within the four-channel limitation.

Amounts of Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid". Where the amounts and types of programming proposed in the illustrative program schedule and in the grid are inconsistent, we will consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits such a level of programming. *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992). Trinity's illustrative schedule proposes an average of 24.375 hours of ITFS programming per

[1] See *Van Vleck Independent School District*, 7 FCC Rcd 7231, n.1 (1992).

[2] A "local" applicant is generally an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. §74.932, Note 1.

[3] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of total ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

channel per week. The schedule, however, does not indicate which programs will be formal (for academic credit), as required by Question 5 of Section IV of FCC form 330. Accordingly, we will consider this programming as nonformal for the purpose of determining merit points. *Valley View Independent School District*, 7 FCC Rcd 7228 (1992). Trinity's programming grid proposes an average of 4 hours of formal educational programming per channel per week.[4] Because neither the schedule nor the grid establishes the threshold amount at which merit points are awarded, Trinity is entitled to no programming merit points. Region 3's illustrative schedule and programming grid both indicate that 41 hours of formal educational programming per channel per week will be offered. Thus, Region 3 is entitled to two merit points for programming.

E- and F- Channel Group Relocation. Neither of the applicants is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, this factor is inapplicable here.

Total. Trinity is entitled to four points for being local, three points for being accredited, and two points for observing the four-channel limitation, for a total of nine points. Region 3 is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation and two points for proposing at least 41 hours of formal educational programming per channel per week, for a total of eleven points. Thus, the selectee is Region 3.

OTHER MATTERS

5. Region 3 proposes to lease its excess capacity for non-ITFS use as permitted by Section 74.931, and has submitted a copy of its lease agreement with United States Wireless Cable, Inc. (U.S. Wireless). The lease, however, fails to conform entirely with the Commission's requirements. The term of the lease is calculated to run for five years from the date on which commercial broadcasting on the channels commences, with five successive five-year renewals at the sole discretion of U.S. Wireless. These provisions are inconsistent with the Commission's maximum term for excess capacity leases of ten years from the date of grant of the underlying authorization. *Instructional Television Fixed Service - Report and Order in Gen. Dockets 90-54 and 80-113*, 5 FCC Rcd 6410, 6416 (1990). Although inconsistent with our requirements for excess capacity leases, this provision neither reflects on the applicant's basic or comparative qualifications nor precludes grant of an authorization. *Van Vleck Independent School District*, 7 FCC Rcd at 7233. Accordingly, Region 3's authorization will be conditioned upon conformity of the lease to Commission requirements. Further, no petitions to deny or informal objections have been filed against Region 3's application. In view of the above, we find Region 3 to be fully qualified and conclude that grant of its application would serve the public interest, convenience, and necessity.

6. Accordingly, IT IS ORDERED, That the above-captioned application for Trinity Episcopal School Victoria IS DENIED, and the above-captioned application of Region 3 Educational Service Center IS GRANTED, subject to the condition that, within 30 days from the release date of this Order, Region 3 Educational Service Center submits to the Chief, Distribution Services Branch for approval information demonstrating compliance with Commission requirements including, if appropriate, an amended excess capacity lease conforming to the requirements discussed herein.

7. The staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[4] Trinity amended its application on January 4, 1993, after the "B" cut-off date of July 22, 1992, to make a "clerical correction" of the information submitted in its initial program grid. If considered, this amendment would upgrade Trinity's comparative position. However, an applicant's comparative position cannot be enhanced by amendments filed after the "B" cutoff date and, therefore, Trinity's amendment will not be considered. See *Second Report and Order*, 101 FCC 2d at 74.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

UNIFIED SCHOOL DISTRICT #511 Zenda, Kansas	File No. BPLIF-911227DS
SEILING PUBLIC SCHOOLS Enid, Oklahoma	File No. BPLIF-920131DU
MOORELAND PUBLIC SCHOOLS Alva, Oklahoma	File No. BPLIF-920204DD
PHILLIPS UNIVERSITY Enid, Oklahoma	File No. BPLIF-920323DE

For Construction Permit and License in the Instructional Television Fixed Service on Channels D1-D4

MEMORANDUM OPINION AND ORDER

Adopted: September 15, 1993; Released: September 27, 1993

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Unified School District #511 (Unified), Seiling Public Schools (Seiling), Mooreland Public Schools (Mooreland), and Phillips University (Phillips), each seeking a construction permit and license on Channels D1-D4 in the Instructional Television Fixed Service (ITFS).[1] The applicants propose to serve schools in north central Oklahoma and south central Kansas.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). All four applicants are qualified to be ITFS licensees. Unified is a school district accredited by the Kansas State Department of Education, whereas Seiling and Mooreland are school districts accredited by the Oklahoma State Department of Education. Phillips is an educational institution accredited by the North Central Association of Colleges and Schools. Of the four applicants, only Unified is applying to provide ITFS service to schools within its district. Phillips does not propose to serve its own enrolled students. Rather, it proposes to provide formal educational programming to high schools in the area where its campus is located. Similarly, Seiling and Mooreland propose to provide formal educational programming to accredited schools that are not within their respective jurisdictions. Accordingly, each of these three applicants has submitted the requisite letters of intended use from their respective receive sites. Unlike Phillips, Seiling and Mooreland are not local applicants and have therefore also demonstrated the establishment of local program committees in the communities they propose to serve. See 47 C.F.R. Sections 74.932(a), Notes 2 and 3.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of 12 merit points based on five criteria deemed to be most relevant in predicting which applicant would be best qualified to provide the service for which the ITFS spectrum has been established. *ITFS Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[2] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by that applicant of four or fewer ITFS channels within the particular area. Fourth, either one or "two points may be awarded to applicants for specified levels of ITFS programming.[3] Fifth, one point is awarded to applicants which are existing Channel E or F licensees seeking to relocate on another ITFS channel

[1] A petition to deny was filed jointly by Phillips University and NDW Company against the application of Mooreland. Because of our action herein, however, the petition will be dismissed as moot.

[2] A "local" applicant is an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order* at 59; 47 C.F.R. Section 74.932 Note 1.

[3] One point is awarded for a proposed schedule of at least 21 average hours per channel per week of formal educational programming or of at least 41 average hours per channel per week of other ITFS programming. Two points are awarded for a proposed schedule of at least 41 average hours per channel per week of formal educational programming or at least 61 hours per channel per week of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, Unified, Seiling, Mooreland, and Phillips are each awarded points based on the following criteria:

Localism. Unified and Phillips are entitled to four points because they are a school district and a university, respectively, having one or more receive sites within the communities in which the applicants are located. In contrast, Seiling and Mooreland propose to serve only schools located outside their respective jurisdictions. Accordingly, only Unified and Phillips are entitled to four points for being local. See *Argonia Unified School District #359*, 8 FCC Rcd 4286 (1993).

Accreditation. Unified is entitled to three points for being an accredited school district serving its own students. While Phillips is an accredited university, it proposes to serve students located at various high schools in the vicinity, rather than students enrolled at the university itself. Therefore, while eligible, it is not entitled to any comparative points for accreditation. See *Second Report and Order* at 69; 47 C.F.R. Section 74.913(b)(2). Likewise, Seiling and Mooreland are accredited school districts that are proposing to serve students outside their respective jurisdictions and are also not entitled to any points for accreditation.

Four-Channel Limitation. None of the applicants is the licensee of other ITFS facilities or is applying for additional channels in its proposed service area. Consequently, each applicant is entitled to two points for remaining within the four-channel limitation.

Amount of Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid". Where amounts and types of programming proposed in an applicant's schedule and grid are inconsistent, we will consider as correct, for comparative proposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits such a level of educational programming. *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992). Unified's illustrative schedule proposes an average of 24.4 hours of ITFS programming per channel per week. However, the schedule does not indicate how many hours are devoted to formal educational programming, as required by Question 5 of Section IV of FCC Form 330. Accordingly, we will consider this programming as nonformal for the purpose of determining merit points. *Valley View Independent School District*, 7 FCC Rcd 7228 (1992). In contrast, Unified's "program grid proposes four hours of formal educational programming per channel per week.[4] Because neither the amount of programming specified in the illustrative schedule nor in the grid reaches the threshold at which points are awarded, Unified is not entitled to any programming merit points.

The illustrative schedule and program grid for Phillips propose an average of 23.3 hours of ITFS programming per channel per week, with 8.5 hours being devoted to formal educational programming. Since the amount of programming specified does not reach the threshold amount at which merit points are awarded, Phillips is entitled to no programming merit points.

Both Seiling's and Mooreland's illustrative schedules and programming grids propose an average of 20.5 hours of formal educational ITFS programming per channel per week. Because neither applicant's schedule or grid reaches the threshold amount at which merit points are awarded, neither Seiling nor Mooreland is entitled to any programming merit points.

E and F-Channel Relocations. None of the applicants is the current licensee of E or F channels seeking to relocate to other channels. Consequently, none is entitled to the one point for such applicants.

Total. Unified is entitled to a total of nine points: four points for being local; three points for being accredited; and two points for observing the four-channel limitation. Phillips is entitled to a total of six points: four points for being local; and two points for observing the four-channel limitation. Seiling and Mooreland are each entitled to two points for observing the four-channel limitation. Thus, the selectee is Unified.

OTHER MATTERS

5. Unified proposes to lease its excess capacity for non-ITFS use as permitted by Section 74.931, and has submitted a copy of its lease with Ruralvision Central, Inc., which conforms in all respects with Commission requirements. Additionally, there are no petitions to deny filed against Unified's application. In view of the above, we find Unified to be fully qualified and conclude that grant of its application would serve the public interest, convenience and necessity.

6. Accordingly, IT IS ORDERED, That the application of Unified School District #511 (BPLIF-911227DS) IS GRANTED, that the applications of Phillips University (BPLIF-920323DE), Seiling Public Schools (BPLIF-920131DU), and Mooreland Public Schools (BPLIF-920204DD) ARE DENIED, and that the petition to deny filed jointly by Phillips and NDW Company IS DISMISSED as moot.

7. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[4] Unified submitted an amendment on March 5, 1993, after the "B" cut-off date of November 3, 1992, to "clarify" the number of hours of formal educational programming proposed in the grid. If considered, this amendment would upgrade Unified's comparative position. However, an applicant's comparative position cannot be enhanced by amendments filed after the "B" cut-off date and, therefore, this "clarifying" amendment will not be considered. See *Second Report and Order* at 74.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Tel. and Tel. Co., *et al*,
- Accounting Instructions for the
Judgment and Other Costs Associated
with the *Litton Systems* Antitrust
Lawsuit

ORDER ON REMAND

Adopted: September 7, 1993; Released: September 27, 1993

By the Commission:

I. INTRODUCTION

1. In *Litton Accounting Appeal*,[1] the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit or court) vacated and remanded the Commission's decisions prescribing the accounting treatment for litigation expenses incurred by American Telephone and Telegraph Company (AT&T) in the defense of the Litton antitrust suit.[2] In those decisions, the Commission had required AT&T and the Bell Operating Companies (BOCs) to move those expenses from the operating, or above-the-line accounts, in which they had been recorded throughout the duration of the Litton case, to a nonoperating, or below-the-line account.[3] The court held that the Commission had failed to adequately justify this accounting treatment and vacated the decisions. For reasons discussed below, on remand, we find that no further action in this proceeding is warranted. We therefore terminate this proceeding.

II. BACKGROUND

2. Begun in 1976, the Litton antitrust suit alleged that certain practices by AT&T in the terminal equipment market violated the antitrust laws. The Common Carrier Bureau required AT&T to keep an accounting of all expenses incurred in the defense of that lawsuit.[4] From 1976 to 1984, AT&T properly recorded those expenses in operating expense accounts. In 1984, after the judgment against AT&T was affirmed and *certiorari* was denied by the Supreme Court,[5] the Commission required AT&T and the BOCs to charge the judgment and associated litigation expenses to a nonoperating account.[6] Because the litigation expenses previously had been recorded in operating expense accounts, the Commission required AT&T and the BOCs to credit, in the then current period, the operating expense accounts in which the litigation expenses were originally recorded. On reconsideration, the Commission affirmed this accounting treatment, and several BOCs petitioned the court to review the Commission's decisions.[7]

3. Shortly after adopting the *Litton Accounting Order*, the Commission initiated a general rulemaking proceeding to establish accounting rules and ratemaking policies for, *inter alia*, litigation costs incurred by carriers in defending federal antitrust suits and other cases involving violation of federal law.[8] In the *Litigation Costs Proceeding*, the Commission concluded that litigation expenses associated with these lawsuits should be recorded in operating expense accounts as incurred. Unlike the approach taken in the *Litton Accounting Proceeding*, however, under the new rules, the accounting treatment of litigation expenses would not change after an adverse judgment became final. Litigation expenses would, however, be subject to possible "recapture" through the ratemaking process.[9] The *Litigation Costs Proceeding* is also before us on remand.[10]

III. DISCUSSION

4. On remand, we conclude that further action in this proceeding is not warranted. In the *Litton Accounting Appeal*, the court expressed concern over the potential adverse ratemaking consequences for the carriers that could result from the accounting reclassification of litigation expenses, *i.e.*, the rebuttable presumption against recovery of those expenses in subsequent rate proceedings.[11] We note how-

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[1] Mountain States Tel. and Tel. Co. v. FCC, 939 F.2d 1021 (D.C. Circuit 1991) (*Litton Accounting Appeal*).

[2] American Tel. and Tel. Co., *et al.*, Accounting Instructions for the Judgment and Other Costs Associated with the Litton Systems Antitrust Lawsuit, 98 FCC 2d 982 (1984) (*Litton Accounting Order*), *recon. denied*, 3 FCC Rcd 500 (1988) (*Litton Accounting Recon. Order*) (collectively, the *Litton Accounting Proceeding*).

[3] Under the terms of the Modified Final Judgment, the BOCs were contingently liable for portions of the judgment and associated litigation expenses from the Litton antitrust suit. *See* United States v. Western Electric Co., Inc., 569 F. Supp. 1057, 1069-74 (D.D.C. 1983).

[4] *See Litton Accounting Order*, 982 FCC 2d at 983.

[5] Litton Systems, Inc. v. AT&T, 700 F.2d 785 (2nd Cir. 1983), *cert. denied*, 464 U.S. 1073, 104 S. Ct. 984 (1984).

[6] *Litton Accounting Order*, 98 FCC 2d at 985-987.

[7] Carriers did not challenge the below-the-line accounting treatment of the Litton judgment.

[8] *See* Notice of Proposed Rule Making to amend Part 31 Uniform System of Accounts for Class A and Class B Telephone Carriers to account for Judgments and Other Costs Associated with Antitrust Lawsuits, and Conforming Amendments to the Annual Report Form M, CC Docket No. 85-64, *Notice of Proposed Rulemaking*, 50 Fed. Reg. 19421 (May 8, 1985), *Report and Order*, 2 FCC Rcd 3241 (1986), *recon.*, 4 FCC Rcd 4092 (1989) (collectively, *Litigation Costs Proceeding*), *vacated and remanded sub nom.*, Mountain States Tel. and Tel. Co. v. FCC, 939 F.2d 1035 (D.C. Cir. 1991) (*Litigation Costs Decision*).

[9] "Recapture" required the carrier to exclude the litigation expenses from its revenue requirement in the next tariff filing occurring after the judgment became final or the post-judgment settlement was entered.

[10] The court remanded the litigation costs rulemaking orders because it concluded that the Commission had not adequately justified application of the rules beyond the antitrust context, and did not sufficiently consider the probable effects of the rules on the carriers' incentives. *Litigation Costs Decision*, 939 F.2d 1042. We recently initiated a separate proceeding to address the issues remanded by the court in the *Litigation Costs Decision*. *See* Accounting for Judgments and Other Costs Associated with Litigation, *Notice of Proposed Rulemaking and Order*, CC Docket No. 93-240, FCC 93-424 (released Sept. 9, 1993).

[11] *Litton Accounting Appeal*, 939 F.2d at 1030.

ever, that the accounting reclassification of the Litton litigation expenses to a nonoperating account was not followed by actual recapture of these expenses in the 1985 Access Tariff proceeding.[12] Therefore, the potential ratemaking consequences which concerned the court were not, in fact, realized. Thus, with respect to the carriers no further action is necessary.[13]

5. From the perspective of consumers, we note that ratepayers in this particular instance have already borne through interstate rates the expenses incurred by AT&T during the Litton litigation. In remanding this case to the Commission, the court stated that it "[did] not suggest that the Commission cannot provide an acceptable rationale for application of the challenged orders in the precise form in which they are... ."[14] Despite this statement, however, the *Litton* court's opinion, read in context and considered in light of the procedural posture of this proceeding, offers little hope that the Commission can at this juncture recover the Litton litigation expenses for ratepayers. Given the scant likelihood of aiding ratepayers in this proceeding, we see no public interest benefits in pursuing further action, and we therefore terminate this proceeding.[15]

6. Finally, although we will not take further action in this particular adjudicatory proceeding, we note that our general rules regarding litigation expenses are still before the Commission on remand. We recently initiated a separate proceeding to address the issues remanded by the court in the *Litigation Costs Decision*.[16] In that general rulemaking proceeding, we revisit the appropriate prospective accounting and ratemaking treatment of litigation expenses.

IV. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED, that pursuant to Sections 4(i), 4(j), 220(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 220(a), this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[12] Annual 1985 Access Tariff Filings, *Memorandum Opinion and Order*, Mimeo No. 740 (Com. Car. Bur. released, September 30, 1985). *See also* Annual 1985 Access Tariff Filings, *Order Designating Issues for Investigation*, CC Docket No. 86-125, Phase I, Mimeo No. 3643 (Com. Car. Bur. released, April 14, 1986), *Memorandum Opinion and Order*, 4 FCC Rcd 1453 (Com. Car. Bur. 1988).

[13] Since recapture of the Litton litigation expenses did not follow their accounting reclassification, standing alone, we see no need to direct the carriers to reclassify the Litton litigation expenses to operating accounts in the current period. Not only is such an accounting adjustment unnecessary in these circumstances, it would be contrary to the public interest since this would inappropriately distort regulated earnings in the current period and might enable carriers improperly to recover a portion or all of the same expenses twice.

[14] *Litton Accounting Appeal*, 939 F.2d at 1035.

[15] *But cf. Litigation Costs Decision*, 939 F.2d at 1043 (agreeing that Commission through rulemaking "may reasonably erect a presumption against recovery of [antitrust] litigation expenses wherever it may do so with respect to [antitrust] judgments and settlements").

[16] Accounting for Judgments and Other Costs Associated with Litigation, *Notice of Proposed Rulemaking and Order*, CC Docket No. 93-240, FCC 93-424 (released Sept. 9, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
September 21, 1993

Released: September 27, 1993

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Paramount Stations Group 1800E
of Kerrville, Inc.
Licensee, KRRT(TV)
6218 N.W. Loop 410
San Antonio, TX 78238

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE in the amount of fifteen thousand dollars ($15,000) pursuant to § 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by § 0.283 of the Commission's Rules for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

In response to the Children's Television Act of 1990, the Commission adopted rules and policies limiting the amount of commercial time which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. 47 C.F.R. § 73.670. The Commission also stated that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (program-length commercial). *Children's Television Programming*, 6 FCC Rcd 2111, 2118 *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992. The Commission also reiterated its prohibition on "host-selling" where program talent or other identifiable program characters are used to deliver commercials. *Children's Television Programming*, 6 FCC Rcd at 5097. *See also, Action for Children's Television*, 50 FCC 2d 1, 8, 16-17 (1974).

On April 1, 1993, you filed an application for renewal of license (FCC Form 303-S) for KRRT(TV), Kerrville, Texas (BRCT-930401KQ). In a supplement to FCC Form 303-S you indicated that KRRT(TV) had failed to comply with the limitations on commercial matter during children's programming on one occasion during your last license term. Subsequently, on August 23, 1993, you submitted an amendment to your renewal application in which you revealed that KRRT(TV) had, in fact, exceeded the commercial limits during children's programming on 28 occasions in 1992. Of the commercial overages, 17 involved instances where you exceeded the commercial limits by amounts ranging from 15 to 55 seconds per clock hour. In addition, on 11 occasions you apparently aired program-length commercials or engaged in host-selling.

You indicate that the corporate parent of the licensee became aware of errors in the quarterly certifications of compliance with the children's commercial limits while reviewing KRRT(TV)'s renewal application. The resulting audit of all of the station's program logs for 1992 revealed the above-referenced commercial violations. You claim that the commercial overages were primarily the fault of the station's Traffic Manager who has now been replaced. You claim that the Traffic Manager relied on unfounded assumptions *i.e.*, that an assistant had correctly formatted all children's commercial matter; that those formats were never changed; and that violations could result only from errors by on-duty switchers. Moreover, you have learned that the Traffic Manager falsely certified that she had reviewed the postbroadcast logs on a daily basis.

You further state that of the 17 commercial overages not involving program-length commercials, 16 of those overages occurred in the first two quarters of 1992. Moreover, all of those 17 commercial overages were less than 60 seconds in duration, 12 were less than thirty seconds in duration, and ten of the 17 were ten or 15 seconds in duration.

You claim that some of the commercial overages may have occurred because the Traffic Department staff did not properly pro rate the commercials during half-hour blocks of children's programming at the end of the station's children's programming block. You claim that while the Traffic Department staff knew that commercials in half-hour blocks of children's programming had to be pro rated to determine compliance with the Commission's rules, the staff incorrectly used five minutes and 30 seconds as the pro ration on weekends rather than the correct five minutes and 15 seconds. You also claim that commercial overages may have occurred because of last minute substitutions of commercial matter for public service announcements by the sales department or from simply scheduling too many commercials.

You also blame the program-length commercials on your Traffic Manager, who, according to you, failed to appreciate that spots for products associated with a program should not be run within that program. Your audit revealed that on five occasions spots for a James Bond toy aired during the James Bond, Jr. program. In addition, on three occasions spots for a Swan's Crossing toy aired during the Swan's Crossing program. Finally, during three Batman programs a commercial was aired featuring a costumed Batman character promoting a local shopping mall. You submit that the last three instances should be viewed as host-selling rather than program-length commercials.

Finally, you state that you have now implemented detailed procedures to avoid commercial overages and program-length commercials in the future. You claim that your rigorous compliance procedures should prevent any future rule violations.

Your record of exceeding the Commission's limits on commercial matter during children's programming on 25 occasions, including eight significant program-length commercials, during your license period after these limits became effective, constitutes a willful and repeated violation of § 73.670 of the Commission's Rules. Accordingly, pursuant to § 503(b) of the Communications Act, Paramount Stations Group of Kerrville, Inc., is hereby advised of its APPARENT LIABILITY FOR A FORFEITURE of fifteen thousand dollars ($15,000) for its apparent willful and repeated violations of 47 C.F.R. § 73.670. The amount specified was reached after consideration of the factors set

forth in § 503(b)(2) of the Communications Act and the guidelines set forth in our *Policy Statement, Standards for Assessing Forfeitures*, FCC 93-382, released August 12, 1993.

Under these standards, $10,000 is the base forfeiture for violation of our children's television commercialization limits. An upward adjustment of the base forfeiture amount may be warranted under established criteria such as egregious misconduct or when the violation is repeated or continuous. An upward adjustment is appropriate in this case. The number of repeated instances of commercial overages, the length of these overages and especially the fact that some of the overages involved program-length commercials, clearly indicates that you did not establish an effective program to monitor compliance with the Commission's commercial limits. When the Commission delayed the effective date of 47 C.F.R. § 73.670 until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance [and], in the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of difficulties." *Children's Television Programming*, 6 FCC Rcd at 5530 n.10. You have not proffered any extraordinary transitional or other difficulties that prevented KRRT(TV) from complying with the commercial limits during your license period. Instead, the violations appear to result from the failure to effectively communicate to station staff the need for strict compliance with the commercial limits and the failure to adequately review the station's performance in this area.

Furthermore, Paramount Stations Group of Kerrville, Inc., IS HEREBY ADMONISHED for violations of our host-selling policy in the three episodes of Batman mentioned above.

With respect to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of § 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CINCINNATI BELL TELEPHONE COMPANY — File Nos. 22058-CD-P/ML-01-91, 21915-CD-P/ML-01-91

For facilities in the Domestic Public Land Mobile Radio Service on frequency 152.72 MHz at Paris, Ohio and Bethel, Ohio on Call sign KIY733

MEMORANDUM OPINION AND ORDER

Adopted: August 12, 1993; Released: September 27, 1993

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Cincinnati Bell Telephone Company (Cincinnati Bell) filed the captioned applications on January 2, 1991 and December 20, 1990, respectively. Danny's Two Way Communications (DanComm) filed pleadings to dismiss those applications as untimely. For the reasons set forth below, we dismiss Cincinnati Bell's applications.

II. BACKGROUND

2. Danny's Two Way Communications (DanComm) filed applications for frequency 152.72 MHz in Washington Court House, Georgetown, and Hillsboro, Ohio on November 21, 1990.[1] Cincinnati Bell Telephone Company (Cincinnati Bell) filed the captioned mutually exclusive applications for frequency 152.72 MHz before the 60-day cut-off period had expired. *See* 47 C.F.R. § 22.31(b). Cincinnati Bell specified in its applications that it was intending to provide one-way paging service on this frequency.

3. On July 17, 1991, the Mobile Services Division (MSD) released a public notice, Report No. PMS-91-42, listing a Cincinnati Bell application as acceptable for filing for frequency 931.5375 MHz near Dry Creek, Kentucky.[2] The Dry Creek location is 33.3 miles from Bethel, Ohio and 36.3 miles from Paris, Ohio, where Cincinnati Bell had its 152.72 MHz applications pending.

4. DanComm filed petitions to deny the captioned applications in November 1991. Cincinnati Bell filed oppositions, and DanComm filed replies.[3]

5. DanComm and Cincinnati Bell's mutually exclusive applications were sent to lottery on December 11, 1991. Cincinnati Bell was the selectee in the lottery for its Paris and Bethel, Ohio sites.[4]

III. DISCUSSION

6. DanComm argues that the 931.5375 MHz application filed by Cincinnati Bell amended Cincinnati Bell's 152.72 MHz applications and caused the 152.72 MHz applications to be considered newly filed as of July 17, 1991 under the provisions of Section 22.525(e) of the Commission's Rules, 47 C.F.R. § 22.525(e).[5] It concludes that Cincinnati Bell's application for frequency 152.72 MHz was no longer mutually exclusive with DanComm's applications.

7. In its oppositions, Cincinnati Bell did not respond to DanComm's argument that its 931.5375 MHz application amended Cincinnati Bell's Bethel and Paris, Ohio applications. Rather, Cincinnati Bell noted that it had lowered the power at its Paris, Ohio site to eliminate the mutual exclusivity with DanComm's applications.

8. We find that Cincinnati Bell's 931.5375 MHz application amended its 152.72 MHz application and caused it to be newly filed under Section 22.525(e) of the Commission's Rules, 47 C.F.R. § 22.525(e). Cincinnati had a one-way application on file for 152.72 MHz. Then, it filed an application for 931.5375 MHz. Its actions fall within the specific provisions of the rule.[6] Therefore, we find that Cincinnati Bell's 931.5375 MHz application amended its 152.72 MHz applications and caused them to be newly filed

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[1] File Nos. 20703-CD-P/ML-01-91, 20745-CD-P/ML-01-91, and 20703-CD-P/ML-01-91, respectively.

[2] File No. 26567-CD-P/ML-01-91.

[3] Although petitions to deny were due to be filed by August 18, 1991, we will treat DanComm's late-filed petition as an informal comment under Section 1.41 of the Commission's Rules. 47 C.F.R. §1.41.

[4] Cincinnati Bell's applications were consolidated under file no. 21915-CD-P/ML-01-91 in the lottery.

[5] Section 22.525(e) of the Commission's Rules states, in part:

> An applicant filing an application for a 900 MHz paging frequency at a location within forty miles of a pending one-way application, without dismissing the previously filed pending application will be treated as amending the previous application. The amended application will be considered newly filed and subject to the applicable cut-off procedures.

47 C.F.R. § 22.525(e).

[6] In accordance with the policies underlying this rule, we are making this finding to comply with "the decision to authorize one frequency at a time...." *One Way Paging Stations*, 92 FCC 2d 631, 637 (1982). That Order went on to say, "[T]his limit is applicable to all paging applications that have been filed and to all paging frequencies which will be filed after the adoption of this Order." *Id.* The Commission, in the subsequent flexible allocation docket, permitted applicants to propose one-way (paging) service on two-way channel pairs. *Flexible Paging*, 4 FCC Rcd 1576 (1989). In so doing the Commission did not require an applicant to specify in its application the type of service it proposed to provide. It did not eliminate the policy of one paging frequency at a time; it only enlarged the field of frequencies available for paging service. The Commission's flexibility regarding use of the spectrum does not negate its policy of encouraging new entrants in the market. *See Paging Systems - DPLMRS*, 89 FCC 2d 1337, 1353 (1982). To encourage new entrants, the Commission limits applicants to one frequency at a time. *Id.* at 1350. Thus, Cincinnati Bell may not have two paging applications on file without the second amending the first, causing it to be newly filed.

as of July 17, 1991. That is well past the cut-off date established by DanComm's applications. Therefore, we are setting aside the results of the lottery held concerning DanComm and Cincinnati Bell's applications on December 11, 1991 because Cincinnati Bell was not entitled to comparative consideration. 47 C.F.R. § 22.31(b).

9. Accordingly, Cincinnati Bell's applications for 152.72 MHz will be dismissed herein. The MSD staff will review DanComm's pending applications for 152.72 MHz, and Cincinnati Bell's 931.5375 MHz application, to determine if they can be granted.

IV. ORDERING PARAGRAPHS

10. IT IS HEREBY ORDERED THAT the applications filed by Cincinnati Bell Telephone Company for Bethel, Ohio and Paris, Ohio, File Nos. 21915-CD-P/ML-01-91 and 22058-CD-P/ML-01-91, respectively, ARE DISMISSED AS UNTIMELY.

11. IT IS FURTHER ORDERED THAT the lottery held December 11, 1991 in which Cincinnati Bell Telephone's application 21915-CD-P/ML-01-91 was chosen first IS SET ASIDE.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-167

In the Matter of

Amendment of Section 73.202(b), RM-8256
Table of Allotments,
FM Broadcast Stations.
(Chillicothe, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 8, 1993; Released: September 28, 1993

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 4179 (1993), issued in response to a petition filed by Livingston Broadcasting Corporation ("petitioner"), proposing the substitution of Channel 280C3 for Channel 280A at Chillicothe, Missouri. Petitioner also requested modification of its license for Station KCHI-FM, Channel 280A, to specify operation on Channel 280C3. Petitioner filed comments in which it reaffirmed its interest in the channel.[1] No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 280C3 for Channel 280A at Chillicothe, Missouri, since it would provide expanded reception service to the community. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[2] In addition, we have authorized a modification of the license for Station KCHI-FM, Channel 280A, Chillicothe, Missouri, to specify operation on Channel 280C3, in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 12, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Chillicothe, Missouri	280C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KCHI-FM, Chillicothe, Missouri, IS MODIFIED to specify operation on Channel 280C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Livingston Broadcasting Corporation, licensee of Station KCHI-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1]In response to the *Notice*, petitioner also provided an affidavit verifying the statements in the petition.
[2]The coordinates for Channel 280C3 at Chillicothe are 39-45-15 and 93-27-09.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-173

In the Matter of

Amendment of Section 73.606(b), RM-8262
Table of Allotments,
TV Broadcast Stations.
(Hoisington, Kansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 8, 1993; Released: September 28, 1993

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 4358 (1993), issued in response to a petition filed by Clear Channel Television Licenses, Inc. ("petitioner"), proposing the allotment of UHF Television Channel 14 to Hoisington, Kansas, as that community's first local television service. Petitioner filed comments reiterating its intention to apply for the channel if allotted.[1] No other comments were received.

2. Hoisington (population 3,678)[2] in Barton County (population 31,343), is located in Central Kansas, approximately 150 kilometers (93 miles) northwest of Wichita, Kansas.

3. We believe the public interest would be served by allotting Channel 14 to Hoisington, Kansas, since it would provide the community with its first local television transmission service. As indicated in the *Notice*, UHF Television Channel 14 can be allotted to Hoisington, Kansas, in conformity with the minimum distance separation requirements of Section 73.610 of the Commission's Rules without a site restriction.[3] The allotment of Channel 14 to Hoisington requires a plus offset.[4] Although the Commission has imposed a temporary freeze on new television allotments in certain metropolitan areas, the allotment at Hoisington is not affected thereby.[5]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 12, 1993,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Hoisington, Kansas	14+

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1]Petitioner is the licensee of Station KSAS(TV), Wichita, Kansas.

[2]Population figures are taken from the 1990 U.S. Census.

[3] The coordinates for Channel 14+ at Hoisington are 38-31-00 and 98-46-36.

[4] "A station with a plus or minus offset is required to operate with its carrier frequency 10 kHz above or below the normal carrier frequency. A different offset between two television stations reduces interference and makes possible the separation criteria set forth in our Rules." *Crandon, Wisconsin*, 3 FCC Rcd 6765 n.1 (1988).

[5] *See Notice of Inquiry*, 2 FCC Rcd 2125 (1987) and *Order*, 52 FR 28346, July 29, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-172

In the Matter of

Amendment of Section 73.606(b),	RM-8261
Table of Allotments,	
TV Broadcast Stations.	
(Cimarron, Kansas)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 8, 1993; Released: September 28, 1993

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 4356 (1993), issued in response to a petition filed by Clear Channel Television Licenses, Inc. ("petitioner"), proposing the allotment of UHF Television Channel 23 to Cimarron, Kansas, as that community's first local television service. Petitioner filed comments reiterating its intention to apply for the channel if allotted.[1] No other comments were received.

2. Cimarron (population 1,491),[2] in Gray County (population 5,138), is located in southwestern Kansas, approximately 290 kilometers (180 miles) west of Wichita, Kansas.

3. We believe the public interest would be served by allotting Channel 23 to Cimarron, Kansas, since it would provide the community with its first local television transmission service. As indicated in the *Notice*, UHF Television Channel 23 can be allotted to Cimarron in conformity with the minimum distance separation requirements of Section 73.610 of the Commission's Rules provided there is a site restriction 2.7 kilometers (1.7 miles) west of the community. [3] The site restriction will prevent a short spacing to vacant Channel 21 in Dodge City, Kansas. Although the Commission has imposed a temporary freeze on new television allotments in certain metropolitan areas, the allotment at Cimarron is not affected thereby.[4]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 12, 1993,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Cimarron, Kansas	23

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Petitioner is the licensee of Station KSAS(TV), Wichita, Kansas.

[2] Population figures are taken from the 1990 U.S. Census.

[3] The coordinates for Channel 23 at Cimarron are 37-48-41 and 100-22-38.

[4] *See Notice of Inquiry*, 2 FCC Rcd 2125 (1987) and *Order*, 52 FR 28346, July 29, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-247

In the Matter of

Amendment of Section 73.202(b), RM-8328
Table of Allotments,
FM Broadcast Stations.
(Pauls Valley, Oklahoma)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 8, 1993; Released: September 28, 1993

Comment Date: November 19, 1993
Reply Comment Date: December 6, 1993

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Washita Broadcasting, Inc. ("petitioner"), requesting the substitution of Channel 249C3 for Channel 249A at Pauls Valley, Oklahoma, and the modification of Station KGOK's license to specify the higher class channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 249C3 for Channel 249A at Pauls Valley since it could provide the community with a wide coverage area FM service and enable Station KGOK to expand its service area. Channel 249C3 can be allotted to Pauls Valley in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.5 kilometers (3.4 miles) southwest to accommodate petitioner's desired transmitter site.[1] We recognize that Channel 249C3 at Pauls Valley is short-spaced to the present operation of Station KTNT-FM, Channel 249A, Edmond, Oklahoma. However, Station KTNT-FM's license has been modified to Channel 250A pursuant to the *Report and Order* in MM Docket No. 92-53, 7 FCC Rcd 7533 (1992), and an application to implement the modification is pending (BPH-930601IE). A copy of this *Notice* will be sent to Station KTNT-FM. As requested, we also propose to modify Station KGOK's license to specify Channel 249C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Pauls Valley or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Pauls Valley, Oklahoma	249A	249C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 19, 1993,** and reply comments on or before **December 6, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Peter H. Doyle, Esq.
Arter & Hadden
1801 K Street, N.W., Suite 400K
Washington, D.C. 20006-1301
(Counsel to petitioner)

6. IT IS ORDERED, That the Secretary SHALL SEND a copy of this *Notice of Proposed Rule Making* to the licensee of Station KTNT-FM, as follows: Life Broadcasting, Inc., 13 Oakdale Farm Road, Edmond, Oklahoma 73013.

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served

[1] The coordinates for Channel 249C3 at Pauls Valley are North Latitude 34-42-14 and West Longitude 97-15-46.

on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-248

In the Matter of

Admendment of Section 73.202(b), RM-8321
Table of Allotments,
FM Broadcast Stations.
(Pleasant City, Ohio)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 13, 1993; Released: September 28, 1993

Comment Date: November 19, 1993
Reply Comment Date: December 6, 1993

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Peter L. Cea ("petitioner") requesting the allotment of Channel 232A to Pleasant City, Ohio, as the community's first local aural transmission service.[1] Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 232A to Pleasant City since it could provide the community with a first local aural transmission service. Channel 232A can be allotted to Pleasant City in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.5 kilometers (2.8 miles) east to avoid short-spacings to Station WHBC-FM, Channel 231B, Canton, Ohio, and to the outstanding construction permit (BMPH-891102IC) of Station WFCB, Channel 232B1, Chillicothe, Ohio.[2] However, this site restriction does not protect the reference coordinates for the allotment itself. Therefore, final action on this petition may be withheld until Station WFCB is licensed at the site specified in its construction permit. Canadian concurrence in the allotment of Channel 232A to Pleasant City is required since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Pleasant City, Ohio	--	232A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 19, 1993,** and reply comments on or before **December 6, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Peter L. Cea
707 Green Cook Road
Sunbury, Ohio 43074
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served

[1] Although the petitioner's request was signed, he failed to include an affidavit verifying that the statements contained in his petition were accurate to the best of his knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.420(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3910, n.41 (1990). The petitioner is requested to rectify this omission in his comments.

[2] The coordinates for Channel 232A at Pleasant City are North Latitude 39-53-22 and West Longitude 81-29-47.

on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-120

In the Matter of

Amendment of Section 73.202(b), RM-8217
Table of Allotments,
FM Broadcast Stations.
(New Boston, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 10, 1993; Released: September 28, 1993

By the Assistant Chief, Allocations Branch:

1. At the request of Louis M Basso, III ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 3048 (1993), proposing the allotment of Channel 236A to New Boston, Texas. Petitioner filed comments restating his interest in applying for Channel 236A, if allotted to New Boston. No other comments were received.

2. We believe the public interest would be served by allotting Channel 236A to New Boston, since it could provide the community with an additional FM service. Channel 236A can be allotted to New Boston in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 12, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
New Boston, Texas	236A, 278A

4. The window period for filing applications will open on **November 15, 1993,** and close on **December 15, 1993.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 236A at New Boston are North Latitude 33-27-36 and West Longitude 94-25-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

HUGHES COMMUNICATIONS GALAXY, INC. File Nos. ITC-93-228 ITC-93-229

For Authority to Make Available Channels of Communication via the Galaxy VI and SBS-6 Domestic Communications Satellites for Transmissions To and From Various Transborder Locations

ORDER AND AUTHORIZATION

Adopted: September 21, 1993; Released: September 28, 1993

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-referenced applications submitted by Hughes Communications Galaxy, Inc. (Hughes) requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to provide one-way and two-way transborder services between the United States and Mexico and the United States and Canada, and one-way services from the United States to Latin America and the Caribbean, over the Galaxy VI and SBS-6 satellites. The applications were placed on public notice on June 16, 1993. No comments were received.

2. Hughes operates C-band capacity in Galaxy VI from the 99^0 W.L. orbital location on an interim basis,[1] and has been authorized to replace its Galaxy II satellite at 74^0 W.L. with Galaxy VI.[2] Hughes also has been authorized to operate Galaxy VI at 103^0 W.L. on an interim basis.[3] In addition, Hughes operates Ku-band capacity in SBS-6 from the 99^0 W.L. orbital location on an interim basis, although SBS-6 is assigned to the 72^0 W.L. orbital location. Hughes was recently authorized to operate SBS-6 at 95^0 W.L. Hughes now requests authority to utilize capacity on Galaxy VI, at 74^0 W.L. and 103^0 W.L., and on SBS-6, at 95^0 W.L., for services identical to those previously authorized under the Commission's transborder policy and consulted under Article XIV(d) of the INTELSAT Agreement.

3. The services requested by Hughes for its new satellites are consistent with the types of services authorized under the Commission's transborder policy.[4] We also find that the services requested by Hughes are in accord with current INTELSAT Article XIV(d) consultations,[5] and therefore will cause neither technical interference nor significant economic harm to the global satellite system. Since all prerequisites for issuance of final authority have been met, we conclude that grant of the instant request will serve the public interest.

4. Accordingly, IT IS ORDERED that application File Nos. ITC-93-228 and ITC-93-229 ARE GRANTED, and Hughes is authorized to utilize transponder capacity on Galaxy VI at the 74^0 W.L. and 103^0 W.L. orbital locations, and on SBS-6 at the 95^0 W.L. orbital location, for the provision of (i) one-way and two-way services between the United States and Canada and between the United States and Mexico, and (ii) one-way services from the United States to points in Latin America and the Caribbean which have been consulted under Article XIV(d) of the INTELSAT Agreement.

5. This authorization constitutes the final step with respect to the provision of transborder services only insofar as the U.S. regulatory process is concerned. It does not dispense with any requirements that may be imposed by other countries involved.

6. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained or where the U.S. Government has determined that appropriate copyright protection does not otherwise exist.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

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[1] *See Hughes Communications Galaxy, Inc.*, 5 FCC Rcd 4497 (Com. Car. Bur. 1990).

[2] *See Hughes Communications Galaxy, Inc.*, 7 FCC Rcd 7119 (Com. Car. Bur. 1992).

[3] *See Hughes Communications Galaxy, Inc.*, 8 FCC Rcd 4170 (Com. Car. Bur. 1993).

[4] *See Hughes Communications Galaxy, Inc.*, 7 FCC Rcd 2220 (Int'l Fac. Div. 1992).

[5] *See* BG-98-3 (September 15, 1993); BG-88-72E (March 5, 1991); Public Notice Report IS-0037. Hughes must, of course, operate its system within the technical parameters consulted with INTELSAT.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of

Local Exchange Carriers' Rates for
Expanded Interconnection for
Special Access

Ameritech Operating Companies
Revisions to Tariff F.C.C. No. 2 Transmittal No. 730

MEMORANDUM OPINION AND ORDER

Adopted: September 20, 1993; Released: September 23, 1993

By the Associate Chief, Common Carrier Bureau:

1. On August 13, 1993, the Ameritech Operating Companies (Ameritech) filed Transmittal No. 730 to unbundle certain rate elements of its special access expanded interconnection service. Specifically, Ameritech intends to unbundle from its central office interconnection service the inter-connect panels at the point of termination, in order to permit interconnectors to provide their own inter-connect panels if they so desire.[1] Ameritech also proposes to establish separate DS1 and DS3 repeater rate elements, and to remove the costs of repeater bays and repeater panels from the floor space rate element.[2] Finally, Ameritech plans to revise its digital cross-connect panel rate element to change interconnection for DS3 terminals on a per panel basis to a per DS3 termination basis.[3] Transmittal 730 is scheduled to take effect on September 27, 1993. No petitions were filed against this tariff.

2. This transmittal raises the same issues regarding cost allocations, rate levels, rate structures, and terms and conditions of service as those identified in the *Expanded Interconnection Tariff Order*.[4] Accordingly, Transmittal 730 will become effective following a one-day suspension, and be subject to the investigation initiated in the *Expanded Interconnection Tariff Order*. These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.[5]

3. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the Ameritech Operating Companies' Revisions to its Tariff F.C.C. No. 2, Transmittal No. 730 IS SUSPENDED for one day and an investigation of the referenced tariff transmittals IS INSTITUTED.

4. IT IS FURTHER ORDERED that the Ameritech Operating Companies SHALL FILE tariff revisions reflecting the suspension no later than five days from the release date of this Order.

5. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59. Ameritech Operating Companies should cite the "DA" number of the instant Order as the authority for this filing.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), the Ameritech Operating Companies shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Jill Ross Meltzer
Associate Chief
Common Carrier Bureau

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[1] Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Transmittal No. 730, Description and Justification (D&J) at 1.

[2] *Id.* at 2. Repeater costs are also removed from the electrical cross connect service.

[3] . *Id.*

[4] Ameritech Operating Companies, *et. al*, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (*Expanded Interconnection Tariff Order*).

[5] The Bureau has already designated issues in this investigation. *See* Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access, CC Docket No. 93-162, DA 93-951 (released July 23, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE BELL ATLANTIC COMPANIES,
Complainant,

v. File No. E-93-19

PENN ACCESS CORPORATION,
Defendant.

ORDER

Adopted: September 17, 1993; Released: September 28, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. This is a ruling on motions to compel responses to interrogatories filed by The Bell Atlantic Companies[1] ("Bell Atlantic") and Penn Access Corporation[2] ("Penn Access") in the above-captioned proceeding. Bell Atlantic seeks an Order compelling Penn Access to answer its Interrogatories Nos. 3, 4, 5, 8, 15, 16, 21, 22, and 23. Penn Access seeks an Order compelling Bell Atlantic to answer its Interrogatory No. 2. For the reasons below, we grant the motions in part and deny them in part.[3]

II. BELL ATLANTIC'S MOTION TO COMPEL

A. Interrogatory 3

2. Bell Atlantic's Interrogatory 3 seeks the identity of tariffs, charges, or price lists that Penn Access has filed with other government authorities. Penn Access objects to interrogatory 3 on the ground that the information is contained in the public record and, therefore, not subject to discovery requests. Penn Access argues that it would be unnecessary and unduly burdensome to require it to produce information already in the public record. Moreover, Penn Access contends that Bell Atlantic's request for information filed with state and local authorities is overly broad and irrelevant because the complaint relates solely to matters within the Commission's jurisdiction.

3. We will require Penn Access to answer Interrogatory 3. Penn Access has failed to demonstrate that it would be unduly burdensome to answer the interrogatory and the information being sought appears to be relevant to determining whether Penn Access is providing interstate common carrier services.

B. Interrogatories 4 and 5

4. Bell Atlantic's Interrogatory 4 asks Penn Access to identity documents filed with government authorities relating to authorization for Penn Access to operate any business, or to provide telecommunications services or facilities. Interrogatory 5 requests Penn Access to identify any certificates of public convenience and necessity or like authorizations issued to Penn Access by government authorities. Pen Access objects to these interrogatories arguing that it would be unduly burdensome to require it to provide information that is already in the public record and that Bell Atlantic apparently already possesses the information. In addition, Penn Access contends that the interrogatories are overly broad and irrelevant because they relate to matters outside the Commission's jurisdiction. Bell Atlantic contends that the information is relevant because many so-called local services identified by parties before state or local agencies carry interstate traffic subject to the Commission's jurisdiction. Bell Atlantic argues that the information requested will aid the Commission in determining how Penn Access characterizes its operation to various governmental bodies.

5. We will not require Penn Access to answer interrogatory 4 as crafted. The interrogatory is overly broad and burdensome insofar as its seeks information pertaining to Penn Access' authorizations to operate non-telecommunications services and facilities. We will, however, require Penn Access to identify documents filed with local or state authorities relating to its authority to provide telecommunications services or facilities. We also require Penn Access to respond to interrogatory 5. We believe that the requested information would be relevant to determining the nature and extent of the telecommunications services that Penn Access provides. Penn Access' claim that Bell Atlantic already possesses the information sought by Interrogatories 4 and 5 is unavailing. The interrogatories ask Penn Access to identify documents not produce them.

C. Interrogatories 8, 15, and 16

6. In Interrogatories 8, 15 and 16, Bell Atlantic asks for information concerning the actual operating arrangements under which Penn Access provides service to each of its customers. Although Penn Access has provided a general response, it objects to these interrogatories on the grounds that they are unduly burdensome and request information

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[1] Bell Atlantic Motion to Compel (filed May 3, 1993); Opposition to Motion to Compel (filed May 17, 1993); Reply (filed May 19, 1993).

[2] Penn Access Motion to Compel (filed May 6, 1993); Opposition to Motion to Compel (filed May 19, 1993); Reply (filed May 26, 1993).

[3] Bell Atlantic filed similar formal complaints against eight other parties in File Nos. E-93-13, E-93-14, E-93-15, E-93-16, E-93-17, E-93-18, E-93-20, and E-93-21. On March 22, 1993 the staff issued a letter ruling advising the parties in the various proceedings that, until otherwise directed by the staff, discovery would be limited to the identification and exchange of information relevant to deciding whether the defendants are or have been engaged in the provision of interstate common carrier services. Both Bell Atlantic and Penn Access contend that the information sought in their motions to compel is relevant to a resolution of this issue.

that is confidential and proprietary. Bell Atlantic argues that the information sought is relevant to resolving whether Penn Access provides interstate common carrier services.

7. We will require Penn Access to further answer interrogatories 8, 15 and 16. The information requested concerns the type and nature of the services Penn Access provides and could be relevant to a determination whether the services fall under state or interstate jurisdiction. We do not, however, believe that the potential relevance of this information outweighs the substantial burden that would be placed on Penn Access to provide the information on a customer specific basis. To alleviate this burden, Penn Access will not be required to answer the interrogatory on a customer specific basis but need only describe, in detail, the type, nature and features of the services it provides and general descriptions of the types of customers for each service arrangement identified.[4]

D. Interrogatories 21 and 22

8. Interrogatories 21 and 22 seek information on how Penn Access holds itself out to the public and the number and type of customers to whom Penn Access markets its services. Penn Access objects to these interrogatories on the grounds that they are unduly burdensome and request confidential and proprietary information. Bell Atlantic argues that the requested information is relevant to the issue of whether Penn Access operates as an interstate common carrier. Bell Atlantic further contends that Penn Access fails to demonstrate that the interrogatories are unduly burdensome or request proprietary or confidential information.

9. We will require Penn Access to provide further responses to Interrogatories 21 and 22. The information requested could be relevant and to a determination of the jurisdictional nature of the services it provides. To the extent Penn Access has concerns regarding the confidential or proprietary nature of this information, it may produce the information pursuant to the confidentiality provisions contained in Section 1.731 of the Commission's Rules.

E. Interrogatory 23

10. Interrogatory 23 asks Penn Access to identify requests for services by potential customers that it has rejected and the reasons for the rejections. Penn Access objects to this interrogatory on the grounds that it is unduly burdensome and expensive to answer and requests information that is confidential and proprietary. Penn Access identifies, however, 76 customers/locations that it rejected as incompatible with the unique characteristics of its network. Bell Atlantic claims that a more complete response to the interrogatory should be required because the requested information would help determine whether Penn Access chooses the customers it serves or provides service to all customers on request when it has sufficient facilities.

11. We will not require Penn Access to respond further to interrogatory 23. We have required Penn Access to provide detailed information regarding the nature and type of the services it offers as well as a range of the customers for such services in response to Bell Atlantic's interrogatories 8, 15, 16, 21 and 22. Bell Atlantic has not demonstrated that a further response to Interrogatory 23 is warranted.

III. PENN ACCESS' MOTION TO COMPEL

12. Penn Access' Interrogatory 2 asks Bell Atlantic to identify the factual and legal basis for the allegation in paragraph 3 of its complaint that Penn Access offers interstate common carrier communications services. Although Bell Atlantic provides a response to the interrogatory, Penn Access claims that the response is inadequate and incomplete. Specifically, Penn Access maintains that Bell Atlantic has failed to provide the details in support of Bell Atlantic's claim that Penn Access has held itself out as a interstate common carrier. Penn Access further maintains that Bell Atlantic failed to provide sufficient details with respect to the alleged instances in which Penn Access acted as an interstate common carrier as required by the interrogatory. Bell Atlantic argues that the motion is baseless because Penn Access fails to demonstrate how the information requested would help the Commission determine whether Penn Access provides interstate common carrier services. [5] Bell Atlantic also maintains that Penn Access is already in possession of complete data regarding its own marketing activities.

13. We will require Bell Atlantic to identify documents and materials in its possession that it intends to rely on to support the factual allegations contained in paragraph three of its complaint. Parties to Section 208 proceedings[6] are entitled to discover the facts and information upon which opposing parties base their claims. A party's legal theories and conclusions, however, are not properly subject to discovery requests. The parties will have ample opportunity during the briefing phase of the proceeding to present and support their legal theories and conclusions.

14. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended 47 U.S.C. § 154(i), 208, and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Bell Atlantic's Motion to Compel IS GRANTED, to the extent indicated above and otherwise, IS DENIED.

15. IT IS FURTHER ORDERED, that Penn Access' Motion to Compel IS GRANTED, to the extent indicated above and otherwise, IS DENIED.

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[4] To the extent that such information is believed to be confidential and proprietary, it may be exchanged according to the procedures set forth in 1.731 of the Commission's Rules, 47 C.F.R. § 1.731, pertaining to confidential information produced during discovery.

[5] We note that Bell Atlantic has urged the Commission to reject Penn Access' motion to compel, filed May 6, 1993, as untimely. According to Bell Atlantic, the parties agreed during a March 30, 1993 telephone conference with the staff that the deadline for any motions to compel was May 3, 1993. In the interest of developing a full record and complete record in this proceeding, we deny Bell Atlantic's request and accept Penn Access' motion to compel. While it is true that the staff contemplated an accelerated schedule for filing final motions to compel, it appears that there was some misunderstanding concerning the due date for such motions. In any event, the parties submitted their motions only three days apart and Bell Atlantic does not contend that it would be prejudiced by acceptance of Penn Access' later filing.

[6] 47 C.F.R. §§ 1.721 *et. seq.*

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-181

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Livingston, Montana)	RM-8268

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 13, 1993; Released: September 29, 1993

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 4364 (1993), proposing the allotment of Channel 264C to Livingston, Montana, as that community's second FM broadcast service. The *Notice* was issued in response to a petition filed by Henry Adams ("petitioner"). Petitioner filed comments in support of the allotment of Channel 264C at Livingston and stated his intention to file an application for the channel, if allotted. Jann Holter Berntsen filed comments supporting the proposed allotment at Livingston.

2. We believe the public interest would be served by allotting Channel 264C to Livingston, Montana, in order to provide the community with a second FM broadcast service. As indicated in the *Notice*, Channel 264C can be allotted to Livingston in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 15, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Livingston, Montana	248C1, 264C

4. The window period for filing applications for Channel 264C at Livingston will open on **November 16, 1993,** and close on **December 16, 1993**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 264C at Livingston are 45-39-45 and 110-33-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-148

In the Matter of

Amendment of Section 73.202(b), RM-8236
Table of Allotments,
FM Broadcast Stations.
(Amite, Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 13, 1993; Released: September 29, 1993

By the Assistant Chief, Allocations Branch:

1. At the request of Amite Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 3912 (1993), proposing the allotment of Channel 243A to Amite, Louisiana. Petitioner filed comments reiterating its intention to apply for Channel 243A, if allotted to Amite. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 243A to Amite, since it would provide the community with its first local FM service.[1] Channel 243A can be allotted to Amite in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.8 kilometers (0.5 miles) northeast in order to avoid a short-spacing to Station KRVE-FM, Channel 242C2, Brusly, Louisiana.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 15, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Amite, Louisiana	243A

4. The window period for filing applications will open on **November 16, 1993,** and close on **December 16, 1993.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Station WABL(AM) is licensed to Amite, Louisiana.
[2] The coordinates for Channel 243A at Amite are North Latitude 30-43-49 and West Longitude 90-30-02.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-13

In the Matter of

Amendment of Section 73.202(b),	RM-8156
Table of Allotments,	RM-8234
FM Broadcast Stations.	
(Blanchard, Louisiana and	
Stephens, Arkansas)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 13, 1993; Released: September 29, 1993

By the Assistant Chief, Allocations Branch:

1. At the request of Daryl L. Bordelon ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 787 (1993), proposing the allotment of Channel 271C3 to Blanchard, Louisiana, as the community's first local aural transmission service. Petitioner filed comments reaffirming its intention to apply for Channel 271C3 if allotted to Blanchard. Arkansas Wireless Company ("Wireless") filed a counterproposal.[2] Petitioner and Wireless filed reply comments.

2. In its counterproposal, Wireless requests the allotment of Channel 271A to Stephens, Arkansas, as the community's first local aural transmission service. Wireless states that Stephens' population of 1,137 persons is almost identical with that of Blanchard. However, Wireless contends that since Stephens receives significantly less AM and FM service than Blanchard, its proposal for Stephens should be preferred under Section 307(b) of the Communications Act of 1934, as amended.

3. In response, petitioner states Commission policy dictates that the channel be allotted to the more populous of the two towns, which it argues is Blanchard. Petitioner contends that Wireless incorrectly characterizes Stephens' population as identical to Blanchard's. Petitioner states Blanchard is the larger of the two towns and based on established allotment priority precedent, must prevail.

4. A review of the proposals indicates that Blanchard and Stephens are both deserving of local aural transmission service. In an effort to provide each community with its first local service, the staff performed a search to determined if alternate channels were available. The engineering analysis reveals that there are no alternate channels available to accommodate both communities. Therefore, our decision will be based on the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), which are:

(1) First full-time aural service;

(2) Second full-time aural service;

(3) First local service;

(4) Other public interest matters.

[Co-equal weight given on priorities (2) and (3)]

The allotment of a channel to Blanchard or Stephens would provide a first local service to either community, fulfilling priority (3). Thus, our decision must be based on priority (4) - other public interest matters. In this regard, neither petitioner nor Wireless has provided any evidence to set apart its proposal from the others. Therefore, in determining whether Blanchard or Stephens should receive the allotment, we have looked at other factors, such as the availability of reception service and populations. A Commission engineering analysis indicates that both communities are well-served by reception services.[3] Since each community is served by a number of stations, we believe the new allotment should be made to Blanchard as the larger of two communities. Although we note that the difference in population is very small, Blanchard has a 1990 population of 1,175 while Stephens has 1,137, this is the only distinguishable factor between the two proposals.[4]

5. Channel 271C3 can be allotted to Blanchard in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.8 kilometers (0.5 miles) north to avoid a short-spacing conflict with Station KDET-FM, Channel 272A, Center, Texas.[5]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 15, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Blanchard, Louisiana	271C3

7. The window period for filing applications will open on **November 16, 1993,** and close on **December 16, 1993.**

8. IT IS FURTHER ORDERED, That the counterproposal filed by Arkansas Wireless Company (RM-8234), IS DISMISSED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

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[1] The community of Stephens, Arkansas, has been added to the caption.

[2] Public Notice of the counterproposal was given on May 12, 1993, Report No. 1940.

[3] Blanchard receives service from ten FM signals, 21 daytime AM signals and three night time AM signals, while Stephens receives service from seven FM signals and ten daytime AM signals.

[4] *See e.g., Bostwich and Good Hope, Georgia*, 6 FCC Rcd 6084 (1991); and *Three Oaks and Bridgman, Michigan*, 5 FCC Rcd 1004 (1990).

[5] The coordinates for Channel 271C3 at Blanchard are North Latitude 32-35-18 and West Longitude 93-53-31.

10. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-249

In the Matter of

Amendment of Section 73.202(b), RM-8330
Table of Allotments,
FM Broadcast Stations.
(Calabash and Tabor City,
North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 15, 1993; Released: September 29, 1993

Comment Date: November 22, 1993
Reply Comment Date: December 7, 1993

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Great American Media, Ltd. I ("petitioner"), requesting the substitution of Channel 285C3 for Channel 285A at Tabor City, North Carolina, the reallotment of Channel 285C3 from Tabor City to Calabash, North Carolina, and the modification of Station WYNA's license to specify Calabash as its community of license. Petitioner states that it will apply for the channel, if allotted.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules, which permit the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. *See Modification of FM License ("Change of Community R&O")*, 4 FCC Rcd 4870 (1989), *recon. granted in part ("Change of Community MO&O")*, 5 FCC Rcd 7094 (1990). In support of its proposal, petitioner states that the reallotment of Channel 285C3 from Tabor City to Calabash is in the public interest because it will not deprive Tabor City of its sole local aural transmission service,[1] and will provide Calabash with its first local aural transmission service. It states that the incorporated community of Calabash, with a 1990 U.S. Census population of 1,210 persons, has its own local government consisting of a board of commissioners, its own fire department, post office and approximately 55 businesses. Further, petitioner notes that Calabash is not located in or adjacent to an urbanized area. Petitioner also states that the reallotment would allow Station WYNA to provide service to an additional 66,240 persons, and that while some 9,648 persons would lose service from Station WYNA, those persons in the loss area would continue to receive reception service from seven other FM stations. We note, however, that petitioner does not describe the number of reception services that currently serve the gain area or whether the gain area will include any underserved areas. Petitioner is requested to address these issues in its comments.

3. We believe the public interest would be served by proposing the substitution of Channel 285C3 for Channel 285A and the reallotment of Channel 285C3 from Tabor City to Calabash since it could provide Calabash with its first local aural transmission service and enable Station WYNA to expand its service area. Channel 285C3 can be allotted to Calabash in compliance with the Commission's minimum distance separation requirements with a site restriction of 20.1 kilometers (12.5 miles) north to accommodate petitioner's desired transmitter site.[2] Use of this site is short-spaced to the present operation of Station WNMB, Channel 288A, North Myrtle Beach, South Carolina. However, Station WNMB's license has been modified to specify Channel 290C3 for which a construction permit has been granted (BPH-920305IF).

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Calabash, North Carolina	--	285C3
Tabor City, North Carolina	285A	--

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 22, 1993,** and reply comments on or before **December 7, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Wade H. Hargrove, Esq.
Tharrington, Smith & Hargrove
209 Fayetteville Street Mall
P.O. Box 1151
Raleigh, North Carolina 27602
(Counsel to petitioner)

[1] Tabor City is also served by Station WTAB(AM).
[2] The coordinates for Channel 285C3 at Calabash are North Latitude 34-04-05 and West Longitude 78-31-30.

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-476

In the Matter of

Amendment of Section 73.202(b),	RM-7343
Table of Allotments,	RM-7652
FM Broadcast Stations.	RM-7653
(Cordova, Holly Pond, Warrior,	RM-7654
Eva, Fairview and Falkville,	
Alabama)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: September 16, 1993; Released: September 29, 1993

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration and a Motion for Stay filed by Radio South, Inc. ("Radio South"), licensee of Station WFFN, Channel 237A, Cordova, Alabama, and a Petition for Reconsideration filed by Haleyville Broadcasting Co., Inc. ("Haleyville Broadcasting"), licensee of Station WJBB, Channel 224A, Haleyville, Alabama, directed to the *Report and Order* in this proceeding. *See* 7 FCC Rcd 5489 (1992). For the reasons discussed below, we are dismissing the Petition for Reconsideration and Motion for Stay filed by Radio South, and denying the Petition for Reconsideration filed by Haleyville Broadcasting.

2. The Radio South Petition for Reconsideration is directed against the action allotting Channel 260A to Eva, Alabama, and denying its competing proposal for an upgrade for Station WFFN. On August 11, 1993, Radio South and North Jefferson Broadcasting Company, Inc. filed a Joint Request for Approval of Settlement Agreement looking toward withdrawal of the Radio South Petition for Reconsideration.[1] Accordingly, we will dismiss both the Petition for Reconsideration and the Motion for Stay.

3. In its Petition for Reconsideration, Haleyville Broadcasting contends that our action in this proceeding allotting Channel 223A to Cordova would cause interference to Station WJBB operating on Channel 224A. Haleyville Broadcasting has submitted no engineering exhibit in support of this contention. Instead, Haleyville Broadcasting has only included a statement from its president that a previous first adjacent operation on Channel 225A in Cordova caused interference to the reception of Station WJBB. In this connection, we have undertaken our own engineering analysis. In addition to determining that the interfering contour (54 dBu) of a Channel 223A allotment in Cordova at full facilities would not cause interference to the protected service contour (60 dBu) of Station WJBB, we note that the Channel 223A allotment complies with our minimum spacing requirements with respect to Station WJBB. Specifically, Section 73.207 of the Rules requires a separation of 72 kilometers between first adjacent Class A FM stations. In this instance, the Channel 223A allotment at Cordova is 73.5 kilometers from the licensed Station WJBB site and 79 kilometers from the site specified in an outstanding Station WJBB construction permit (File No. BPH-891010IH). As a consequence, we will not reconsider this allotment because Section 73.209 of the Commission's Rules specifically limits the nature and extent of interference protection to that afforded by the minimum separation requirements, and the maximum powers and antenna heights set forth in the Rules.

4. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration and Motion for Stay filed by Radio South, Inc. ARE DISMISSED.

5. IT IS FURTHER ORDERED, That the aforementioned Petition for Reconsideration filed by Haleyville Broadcasting Co., Inc. IS DENIED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] Pursuant to Section 1.420(j) of the Commission's Rules, Radio South included an affidavit stating that the monies received for withdrawal of its Petition for Reconsideration and Motion for Stay do not exceed its reasonable and prudent expenses incurred in the preparation, filing, and advocacy of its proposed upgrade.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-18

In the Matter of

Amendment of Section 73.202(b), RM-8173
Table of Allotments,
FM Broadcast Stations.
(Coos Bay, Oregon)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: September 16, 1993; Released: September 29, 1993

By the Chief, Policy and Rules Division:

1. The Commission has before it the petition for reconsideration filed by Kenton Sturdevant ("petitioner") of the *Report and Order*, 8 FCC Rcd 4280 (1993), in this proceeding. The *Report and Order* allotted Channel 228A to Coos Bay, Oregon, as the community's third local FM service, in lieu of Channel 271A, as proposed in the *Notice of Proposed Rule Making*, 8 FCC Rcd 949 (1993).[1]

2. Channel 228A was allotted to Coos Bay to avoid a conflict with the pending application of Station KGAL-FM, Brownsville, Oregon, effectuating the upgrading of its facilities from Channel 272A to Channel 272C1. Petitioner argues that the Commission arbitrarily, and without affording him the opportunity to comment, allotted Channel 228A to Coos Bay in lieu of the originally proposed Channel 271A. Petitioner contends that Station KGAL-FM's application should not be an issue here since the station did not file any opposing comments during the rule making.

3. Petitioner states that he had identified Channel 228A as a possible allotment at the time he filed the petition. However, because the channel conflicted with Coos Bay translator Station K228CW and Eugene translator Station K229AB, he opted to propose Channel 271A instead. Station K228CW and Station K229AB are owned by the State of Oregon/State Board of Higher Education. Petitioner states that Station K228CW rebroadcasts the classical music programming of noncommercial Station KWAX-FM, Eugene, Oregon, and it is the only station providing such programming between Portland and Ashland. Station K229AB, according to petitioner, will extend Station KWAX-FM's noncommercial programming to the Reedsport area. Thus, he contends that the allotment of Channel 228A to Coos Bay "facilitates the abandonment of service to a community and severely impacts or eliminates the continued and/or expanded noncommercial classical music service to Coos Bay and Reedsport, Oregon, affecting those populations of approximately 25,000 and 5,000 respectively." Finally, believing that Channel 271A would be allotted to Coos Bay, petitioner states that he researched programming options and intended to rebroadcast portions of Portland Station KINK-FM's programming having found it to be "a viable format consistent with the dial position of Channel 271 (102.1 Mhz) and the economics of a small market, start-up radio station."

4. After careful consideration of the petitioner's request, we will deny his petition for reconsideration. It is well established Commission policy that the Commission has the authority to allot a channel different from that specified in the *Notice of Proposed Rule Making* without giving prior public notice. *See Churubusco, Indiana, et al.*, 4 FCC Rcd 5045 (1989). Further, Paragraph 3(c) of the Appendix places petitioners on notice that a counterproposal may lead to the allotment of channels equivalent to those originally requested. The Commission can also allot a different channel of the same class on its own motion in a rule making proceeding in order to ensure the most efficient use of the spectrum. In this case, the Commission was able to allot a Class A channel to Coos Bay, as requested by the petitioner, and also accommodate the pending application of a full service station seeking to upgrade its facilities. Thus, the action taken in the *Report and Order* conforms to the Commission policy of accommodating pending applications of full service stations wherever possible. *See Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments (MO & O)* 8 FCC Rcd 4743 n.12 (1993). *See, e.g., Hardinsburg, Kentucky*, 7 FCC Rcd 1746 (1992) (when possible, we have modified a rule making proposal to specify an alternate site or channel to accommodate an application). Finally, while we recognize that the allotment of Channel 228A to Coos Bay may result in the displacement of Stations K228CW and K229AB, these stations are not full service noncommercial educational facilities, but rather secondary services, and, as such, are not entitled to interference protection. Section 73.512 of the Commission's rules, which governs the operation of Class D stations, states that these secondary services, which operate within the commercial band, may continue to operate only so long as no interference is caused to any TV or commercial FM broadcast station. If the Class D station does cause prohibited interference, it must stop operating when program tests for the full service station begin.[2]

5. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Kenton Sturdevant to allot Channel 271A in lieu of Channel 228A to Coos Bay, Oregon, IS DENIED.

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[1] Comments in opposition were filed by C&C Broadcasting, Inc. ("C&C"), proposed assignee of Station KGAL-FM, Brownsville, Oregon. C&C's comments are untimely filed and were not accompanied by a request for their acceptance. The Commission's rules do not contemplate the filing of pleadings beyond the comment period unless specifically requested. Therefore, C&O's untimely filed comments will not be considered herein.

[2] Petitioner also raises an issue that Station KGAL-FM's application should not merit protection since it seeks to effectuate its upgrade by moving its transmitter site 30 miles south of its community of license, thus giving at least the appearance of abandoning the smaller community of Brownsville in favor of serving the larger market of Eugene. Petitioner argues that there is no technical reason for such a move since Channel 272C1 can be used at Station KGAL-FM's existing transmitter site. Any arguments regarding the merits of Station KGAL-FM's application are not properly raised in the context of this proceeding and will not be reached herein.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re

USA Mobile Communications, Inc. II — File No. 316MS0005

Notice of Apparent Liability for Forfeiture Penalty for Station KWU442 in the Public Land Mobile Service at North Ridgeville, Ohio

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: September 22, 1993; Released: September 29, 1993

By the Chief, Mobile Services Division:

1. On September 29, 1992, USA Mobile Communications, Inc. II ("USA Mobile") filed FCC Form 489 notifying the Commission of the construction and operation of a new location on frequency 158.70 MHz at North Ridgeville, Ohio. Section 22.117(b)(2) of the Commission's Rules permits the construction and operation of additional transmitter locations without prior Commission approval provided the transmitter location is below Line A, as defined in Section 1.955 of the Commission's Rules. Section 1.955 requires frequency coordination with Canada under certain conditions. In particular, it states that as the result of mutual agreements, the Commission has an arrangement with the Canadian Department of Communications requiring the exchange of frequency assignment information and engineering comments on proposed assignments along the Canada-United States borders in the relevant frequency bands of 150.80 MHz to 174.00 MHz and above Line A.

2. Section 22.117 of the Commission's Rules states in pertinent part:

> (b) Additional transmitters. Licensees may construct and operate additional transmitter locations on the same frequency without obtaining prior Commission approval provided:
>
> (2) The station must be on the United States side of lines A and C as defined in § 1.955 of this chapter.

Because USA Mobile's new transmitter location is located above Line A, the construction and operation of this facility requires prior Commission approval and is not permissive within the terms of Section 22.117(b)(2) of the Commission's Rules. Accordingly, notification by FCC Form 489 is not sufficient in this case.

3. Section 22.3 of the Commission's Rules states in pertinent part:

> No person shall use or operate any device for the transmission of energy or communications by radio in the services authorized by this part except as provided in this part.

Therefore, because USA Mobile did not receive prior authority before it built its facilities, an apparent violation of Sections 22.117 and 22.3 of the Commission's Rules has occurred.

4. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) . . . willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for forfeiture penalty.

We find that USA Mobile's operation is unauthorized because prior authority was never obtained. This unauthorized operation has been continuous since USA Mobile commenced operation at the new location on September 15, 1992. Consequently, USA Mobile's operation constitutes willful and repeated conduct within the terms of the statute.[3]

5. Pursuant to the Commission's 1993 Policy Statement, Standards for Assessing Forfeitures, FCC 93-382, released Aug. 12, 1993, the base forfeiture amount for operating at an unauthorized location is $20,000. USA Mobile's modifications, made to an existing station, did not change either its reliable service area contour or its interference contour; however, we find no adjustment factors under the Policy Statement present and, thus, we do not change the forfeiture amount.

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[3] Section 312(f)(1) of the Communications Act, which also applies to Section 503(b) *see Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991)), provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

Section 312(f)(2) of the Communications Act provides:

> The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

This definition applies to Section 503(b) as well. See H. R. Rep. No. 97-765, 97th Cong., 2nd Sess. 50-51 (1982).

6. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, USA Mobile Communications, Inc. II IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Twenty Thousand Dollars ($20,000) for willful and repeated violations of the aforementioned statutory and rule provisions. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934.

7. Payment of the forfeiture may be made by mailing a check or similar instrument, noting on the payment the File Number of the above captioned proceeding, to the Commission within thirty (30) days of the release date of this Notice, payable to the order of the Federal Communications Commission, to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

8. A copy of this Notice is being sent to USA Mobile Communications II, 11300 Cornell Park Dr., Suite 200, Cincinnati, Ohio 45242-1830, by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 1.49
of the Commission's Rules

ORDER

Adopted: September 17, 1993; Released: September 29, 1993

1. The Commission on its own motion is issuing this Order to amend section 1.49 of its rules, 47 C.F.R. §1.49. Section 1.49 specifies the general format requirements to which most pleadings and other documents filed with the Commission must conform. By this Order, we are amending section 1.49 to require that Commission filings utilize 10- or 12-point type print.

2. Since by definition 10- and 12-point type print consists of 10 and 12 characters per inch, respectively, adoption of the type print requirement will ensure that the page limitations for filings, contained in other sections of the Commission's rules, will not be circumvented by the use of printing reduction processes. The type print requirement adopted here also is consistent with that relating to briefs contained in section 1.50 of the Commission's rules, 47 C.F.R. §1.50, and thus will establish a uniform standard for Commission filings.

3. Accordingly, pursuant to sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, IT IS ORDERED that Part 1 of the Commission's Rules is amended as set forth below, effective upon publication in the Federal Register. This proceeding involves agency practice and procedure, and thus the notice, comment and effective date provisions of section 553 of the Administrative Procedure Act, 5 U.S.C. §553(b)(A), (d), are inapplicable.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Part 1 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303: Implement, 5 U.S.C. 552 and 21 U.S.C. 853a, unless otherwise noted.

2. Section 1.49 is amended by revising paragraph (a) as follows:

§1.49 Specifications as to pleadings and documents.

(a) All pleadings and documents filed in any proceeding shall be on 8 1/2 x 11 inch size paper, and shall be type-written or prepared by mechanical processing methods, in 10- or 12-point type. ***

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-259

In the Matter of

Amendment of Section 73.202(b), RM-8341
Table of Allotments,
FM Broadcast Stations.
(Earle, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 17, 1993; Released: September 30, 1993

Comment Date: November 18, 1993
Reply Comment Date: December 3, 1993

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Earle Broadcasting ("petitioner") requesting the allotment of FM Channel 234C3 to Earle, Arkansas, as that community's first local aural transmission service. Petitioner stated its intention to apply for Channel 234C3 if allotted to Earle, as requested.

2. A staff review of the proposal reveals that Channel 234C3 can be allotted to Earle consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 8.8 kilometers (5.4 miles) northwest of the community.[1]

3. We believe the public interest would be served by proposing the allotment of Channel 234C3 to Earle, Arkansas, since an interest has been expressed in providing that community with its first local aural transmission service. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, to include Earle, Arkansas, as follows:

	Channel No.	
City	Present	Proposed
Earle, Arkansas	--	234C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 18, 1993,** and reply comments on or before **December 3, 1993**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Riley M. Murphy, Esq.
1100 Poydras Street
Suite 2590
New Orleans, LA 70163-2590

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Coordinates used for Channel 234C3 are 35-18-46 and 90-33-04. The site restriction is required to avoid a short spacing to the licensed site of Station KJIW-FM, Channel 233A, Helena, Arkansas, at coordinates 34-30-52 and 90-38-18, and to the site specified in the construction permit issued for Station WOJG(FM), Channel 234A, Bolivar, Tennessee, at coordinates 35-16-39 and 88-55-41, as well as to the reference coordinates for Channel 234A, Bolivar, at 35-15-30 and 88-59-30.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-258

In the Matter of

Amendment of Section 73.202(b), RM-8253
Table of Allotments,
FM Broadcast Stations.
(Hawaiian Ocean View Estates,
Hawaii)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 17, 1993; Released: September 30, 1993

Comment Date: November 18, 1993
Reply Comment Date: December 3, 1993

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by James Stonecipher ("petitioner"), requesting the allotment of Channel 273A to Hawaiian Ocean View Estates, Hawaii, as the community's first local FM service. Petitioner states his intention to apply for the channel, if allotted.

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies "... among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. However, Hawaiian Ocean View Estates is not listed in the Rand McNally Commercial Atlas nor is it listed in the U.S. Census. Petitioner states that Hawaiian Ocean View Estates is a distinct area upon the Island of Hawaii.[1] Furthermore, while petitioner has alleged that there are some local businesses, he has not specifically shown that they are intended to service Hawaiian Ocean View Estates, as opposed to other areas. This is a critical deficiency because, in past cases, we have rejected claims of community status where a nexus has not been shown between the political, social and commercial organizations and the community in question. *See Gretna, Marianna, Quincy and Tallahassee, Florida*, 6 FCC Rcd 633 (1991), and cases cited therein. Therefore, petitioner should present the Commission with specific information to demonstrate that Hawaiian Ocean View Estates has social, economic, cultural, and government indicia to qualify it as a "community" for allotment purposes. *See, e.g., Beaver Springs, Pennsylvania*, 4 FCC Rcd 5373 (1989), *Sargent, Nebraska*, 4 FCC Rcd 3933 (1989), *Bartow, Georgia, et al.*, 4 FCC Rcd 6876 (1989), *East Hemet, California, et al.*, 4 FCC Rcd 7895 (1989), and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.

3. We believe the public interest would be served by proposing the allotment of Channel 273A to Hawaiian Ocean View Estates, Hawaii, as that community's first local aural transmission service. Channel 273A can be allotted to Hawaiian Ocean View Estates in compliance with the Commission's minimum distance separation requirements of the Commission's Rules.[2]

4. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Hawaiian Ocean View Estates, Hawaii	--	273A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 18, 1993,** and reply comments on or before **December 3, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dan A. Alpert
1250 Connecticut Avenue, N.W.
#700
Washington, D.C. 20036
(Attorney for Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from

[1] We note that mere geographical location is not sufficient to establish "community" status. *See Vimville, Mississippi*, 48 FR 5974 (1983), *Hannibal, Ohio*, 6 FCC Rcd 2144 (1991), and *Columbia, California*, 6 FCC Rcd 3292 (1991).

[2] The coordinates for Channel 273A at Hawaiian Ocean View Estates are North Latitude 19-05-37 and West Longitude 155-46-43.

the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-255

In the Matter of

Amendment of Section 73.202(b), RM-8322
Table of Allotments,
FM Broadcast Stations.
(Titusville, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 22, 1993; Released: September 30, 1993

Comment Date: November 18, 1993
Reply Comment Date: December 3, 1993

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Southern Starr Limited Partnership ("petitioner"), licensee of Station WGNE(FM), Channel 251C2, Titusville, Florida, seeking the substitution of Channel 251C1 for Channel 251C2 and the modification of its license to specify the higher powered channel. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 251C1 for Channel 251C2 at Titusville, Florida, since it could enable Station WGNE(FM) to expand its coverage area. Channel 251C1 can be substituted for Channel 251C2 at Titusville in compliance with the Commission's minimum distance separation requirements with a site restriction of 23.6 kilometers (14.6 miles) southeast[1] of the community.

3. In accordance with Section 1.420(g)(3) of the Commission's Rules, we shall propose to modify Station WGNE(FM)'s license without entertaining other expressions of interest in the use of Channel 251C1 at Titusville, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Titusville, Florida	251C2	251C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 18, 1993,** and reply comments on or before **December 3, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Bradford D. Carey
Hardy & Carey
111 Veterans Blvd., Suite 255
Metairie, LA 70005
(Attorney for Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 251C1 at Titusville are North Latitude 28-35-00 and West Longitude 80-34-10.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-256

In the Matter of

Amendment of Section 73.202(b), RM-8326
Table of Allotments,
FM Broadcast Stations.
(Taylorville, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 20, 1993; Released: September 30, 1993

Comment Date: November 18, 1993
Reply Comment Date: December 3, 1993

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Miller Communications, Inc. ("petitioner"), requesting the allotment of Channel 232A to Taylorville, Illinois, as that community's second local aural transmission service. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 232A to Taylorville, Illinois, as that community's second local aural transmission service. Channel 232A can be allotted to Taylorville in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.2 kilometers (4.5 miles) south[1] in order to avoid short-spacings to the licensed sites of Station WRMS(FM), Channel 232A, Beardstown, Illinois and Station WLRW(FM), Channel 233B, Champaign, Illinois.

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Taylorville, Illinois	224B1	224B1, 232A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 18, 1993,** and reply comments on or before **December 3, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John F. Garziglia
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
(Attorney for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 232A at Taylorville are North Latitude 39-29-22 and West Longitude 89-19-45.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-257

In the Matter of

Amendment of Section 73.202(b), RM-8327
Table of Allotments,
FM Broadcast Stations.
(Glasgow, Kentucky)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 21, 1993; Released: September 30, 1993

Comment Date: November 18, 1993
Reply Comment Date: December 3, 1993

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Henry Royse ("petitioner"), requesting the allotment of Channel 231A to Glasgow, Kentucky, as that community's fourth local aural transmission service.[1] Petitioner states his intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 231A to Glasgow, Kentucky, as that community's fourth local aural transmission service. Channel 231A can be allotted to Glasgow in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.9 kilometers (2.4 miles) southeast,[2] in order to avoid short-spacing to a construction permit for Station WHIC(FM), Channel 232C2, Hardinsburg, Kentucky.

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Glasgow, Kentucky	236C, 287C3	231A, 236C 287C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 18, 1993,** and reply comments on or before **December 3, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Henry Royse
Box 1628
Glasgow, Kentucky 42142
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Although petitioner's request was signed and the address provided, it failed to include an affidavit verifying that the statements contained in the petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules, requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, n.41 (1990). Petitioner is requested to rectify this ommission in its comments.

[2] The coordinates for Channel 231A at Glasgow are North Latitude 36-57-41 and West Longitude 85-54-19.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Part 1 of the
Commission's Rules to
Reflect Procedures for
Providing Documents to the
Commission's Copy Contractor

ERRATUM

Released: September 30, 1993

On September 14, 1993, the Managing Director adopted a Memorandum Opinion and Order in this proceeding, DA 93-1126, released September 22, 1993, revising Section 1.773. In the Order, Section 1.773 was inadvertently identified as Section 1.773, subsection (c). The corrected text of Section 1.773 should read as follows:

(a)(4) *Copies, Service.* An original and four copies of each petition shall be filed with the Commission, as follows: the original and three copies must be filed with the Secretary, FCC, Room 222, 1919 M Street, N.W., Washington, D.C. 20554; one copy must be delivered directly to the Commission's Copy Contractor, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Additional, separate copies shall be served simultaneously upon the Chief, Common Carrier Bureau; and the Chief, Tariff Division. Petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on less than 15 days notice shall be served either personally or via facsimile on the filing carrier. If a petition is served via facsimile, a copy of the petition must also be sent to the filing carrier via first class mail on the same day of the facsimile transmission. Petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on 15 or more days notice may be served on the filing carrier by mail.

(b)(3) *Copies, Service.* An original and four copies of each reply shall be filed with the Commission, as follows: the original and three copies must be filed with the Secretary, FCC, Room 222, 1919 M Street, N.W., Washington, D.C. 20554; one copy must be delivered directly to the Commission's Copy Contractor, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Additional, separate copies shall be served simultaneously upon the Chief, Common Carrier Bureau; the Chief, Tariff Division; and the petitioner. Replies may be served upon petitioner personally, by mail or via facsimile.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-250

In the Matter of

Amendment of Section 73.202(b), RM-8331
Table of Allotments,
FM Broadcast Stations.
(Fairview, Pennsylvania)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 17, 1993; Released: September 30, 1993

Comment Date: November 18, 1993
Reply Comment Date: December 3, 1993

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by KDC, Inc. ("petitioner"), requesting the allotment of Channel 298A to Fairview, Pennsylvania, as the community's first local aural transmission service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 298A to Fairview since it could provide the community with a first local aural transmission service. Channel 298A can be allotted to the community in compliance with the Commission's minimum distance separation requirements, with respect to domestic allotments, without the imposition of a site restriction.[1] The allotment would be short-spaced to vacant Channel 298A, Welland, Ontario, and Channel 298A, Stratford, Ontario, Canada. However, we have determined that the Fairview station can limit its power in the direction of these two communities so as to avoid any prohibited overlap of signals. Therefore, we will seek concurrence in the allotment as a specially negotiated allotment by the Canadian government since Fairview is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Fairview, Pennsylvania	--	298A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 18, 1993,** and reply comments on or before **December 3, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Allan G. Moskowitz, Esq.
Kaye, Scholer, Fierman, Hays & Handler
The McPherson Building
901 Fifteenth Street, N.W., Suite 1100
Washington, D.C. 20005-2327
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 298A at Fairview are North Latitude 42-01-48 and West Longitude 80-15-12.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TIME WARNER ENTERTAINMENT COMPANY, L.P. AND U S WEST COMMUNICATIONS, INC. — DF-TW-01

Petition for Waiver of Section 63.54 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: September 13, 1993; Released: September 14, 1993

By the Commission:

I. INTRODUCTION

1. We have before us a petition for waiver ("petition") filed by Time Warner Entertainment Company, L.P. ("TWE") and U S West Communications, Inc.("USWC") seeking a temporary waiver of Section 63.54 of the Commission's rules, 47 C.F.R. § 63.54, which prohibits the provision of video programming by a telephone common carrier within its telephone service area.[1] The United States Telephone Association ("USTA") filed comments supporting the petition, and reply comments were filed by the petitioners. The petition is unopposed. By this order we grant the requested temporary waiver.

II. BACKGROUND

2. Section 613(b) of the Communications Act of 1934, as amended by the Cable Communications Policy Act of 1984 ("Cable Act"),[2] makes it unlawful for any common carrier "to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier." TWE has agreed to admit U S WEST Cable Corporation, a subsidiary of U S WEST, into TWE as a limited partner with a 25.51 percent partnership share. USWC is a U S WEST affiliate, and owns common carriers that provide facilities-based local exchange service subject to Title II of the Communications Act of 1934.[3] TWE has direct and indirect ownership interests in eight cable television systems in the USWC telephone service area.[4] The partnership acquisition would thus place USWC in violation of the Cable Act and the Commission's rules implementing the statutory provisions, absent a waiver.[5] The petition requests a waiver pursuant to Section 63.56 of the rules, 47 C.F.R. §63.56, for good cause shown.[6]

3. Petitioners state that their partnership would permit TWE to take advantage of USWC's expertise in complex switching systems and two-way telecommunications in TWE's planned deployment of "Full Service Networks" ("FSN"). Petitioners describe FSN as "high-capacity, fiber-intensive, broadband interactive networks capable of providing two-way video, voice, and data transmission services."[7] As envisioned by petitioners, FSN would provide "true video-on-demand interactive games, distance learning, and competitive alternatives in the provision of telephony services, including local telephone service and Personal Communications Services." Petitioners state that these services will be made possible by a "fundamental redesign of cable system architecture, combining a 1 GHz hybrid fiber/coaxial system with digital compression and storage facilities to achieve an interactive, unlimited capacity, broadband multimedia telecommunications network." TWE has announced plans to complete the initial phase of the upgrade of the Orlando, Florida cable system to an FSN in 1994.[8]

III. PETITION

4. TWE and USWC seek a temporary 18 month waiver of the cross-ownership restriction to permit the orderly divestment of eight TWE cable systems in USWC's telephone service area. The systems serve approximately 84,000 cable subscribers, less than 2 percent of TWE's total subscribers. Petitioners maintain that their alliance justifies a waiver under the "other good cause" prong of the waiver standard set forth in the Cable Act. Petitioners cite Commission precedent in asserting that a temporary waiver is in the public interest in order to avoid disruption of cable service by existing systems.[9] TWE and USWC contend that

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[1] The petition was filed May 26, 1993. On June 10, 1993, the Commission issued a *Public Notice* which stated that the petition had been filed and set forth deadlines for Comments and Reply Comments. *Public Notice*, DA 93-648, June 10, 1993.

[2] Cable Communications Policy Act of 1984, 47 U.S.C. § 533(b); *see* 47 C.F.R. § 63.54.

[3] Petition at 4.

[4] *Id.*

[5] In a lawsuit brought by subsidiaries of Bell Atlantic Corporation, the U.S. District Court for the Eastern District of Virginia recently declared unconstitutional the statutory telephone company/cable television cross-ownership restriction codified at 47 U.S.C. §533(b), which is modeled after the Commission's pre-existing administrative cross-ownership rule. *C & P Telephone, et al. v. U.S.*, No. 92-1751-A, 1993 U.S. Dist. Court, (E.D. Vir. August 24, 1993). We find nothing in that decision to preclude us from taking the action herein.

[6] 47 C.F.R. §63.56(a) tracks language in the statute that contemplates waiver (47 U.S.C. §533(b)(4)) and states:

> In those areas where the provision of video programming to the viewing public demonstrably could not exist except through a cable system owned by, operated by, controlled by, or affiliated with the local telephone common carrier, or upon other showing of good cause, the provisions of §§ 63.54... may be waived, on the Commission's own motion or on petition for waiver, if the Commission finds that the public interest, convenience and necessity would be served thereby.

[7] Petition at 3.

[8] *Id.*

[9] Petition at 7-8, citing *Pacific Bell*, 6 FCC Rcd 688 (1991)(one year waiver to permit transition of cable system from telephone company to independent cable company); *Lake Telephone Company*, 27 RR 2d 1164 (1973)(9 months waiver to divest after unlawful construction); *Fort Mill Telephone Company*, 10 RR 2d 316 (1970)(one-year waiver).

a good cause waiver is fully justified in the instant case because FSNs will stimulate the development of innovative telecommunications services and will spur competition in the telecommunications marketplace. They argue that establishment of this "electronic superhighway" addresses an important public policy goal, expressed by both the Executive Branch and Congress, of telecommunications infrastructure development.[10] Petitioners note further that the venture will meet a separate public policy objective of business growth and job creation through private sector investment.[11] They maintain that 18 months is a reasonable period for waiver of the rule because it would permit orderly divestment of TWE cable systems.[12]

IV. COMMENTS

5. The petition is not opposed. The sole commenter, USTA, concurs with petitioners that Commission precedent supports a waiver to permit the sale of cable systems by telephone companies to cure violations of the cross-ownership restrictions.[13] USTA argues that no special accounting or other conditions are necessary incident to a waiver grant because US West Cable Corporation, rather than its separate corporate affiliate USWC, is the entity involved in this transaction. USTA contends that the parties intend both corporate and geographic separation.[14]

V. DISCUSSION

6. The cross-ownership restriction in the Cable Act, which is modeled after the Commission's policy pre-existing rule prohibiting telephone companies from providing video programming by cable television systems in their telephone service areas, was intended to "promote competition by curtailing the opportunities telephone companies would otherwise have to take advantage of their monopoly control of the conduits and telephone poles that are required for the transmission of video programs to cable subscribers."[15] The Commission's policy also noted the importance of "analyzing any allegations of potentially adverse cross-subsidization between a carrier's telephone and cable television business."[16] These policy objectives notwithstanding, both the Commission and Congress have recognized that waiver of the cross-ownership prohibition may in some instances be in the public interest.[17] The Cable Act incorporated the Commission's preexisting waiver policy, which permitted waivers on a public interest showing that demonstrated the benefits of joint operation of cable television and telephone facilities.[18] In particular, the Commission has recognized the public interest in avoiding disruption of service to subscribers during the time needed to accomplish the divestiture that is required by the cross-ownership provisions.[19]

7. Significantly, we note that the petitioners seek a waiver only for the limited purpose of providing for a transition period during which TWE will divest the cable systems in USWC's telephone service areas that raise cross-ownership issues. Upon divestiture of the subject cable systems, petitioners will be in compliance with the cross-ownership restriction and the waiver will no longer be necessary. Thus, this case does not present a situation where a telephone common carrier will be involved in providing video programming to subscribers in its telephone service area for any significant period of time.

8. In addition, as discussed below, we believe the TWE/USWC proposal outside the USWC service area offers the promise of significant public interest benefits, including technological innovation, increased consumer choice and enhanced competition. A prompt and orderly divestment of the TWE cable systems in USWC territory is necessary to realize these potential public interest benefits as quickly as possible. Absent a waiver at this time, the project would be delayed needlessly and consumers would be deprived of the advantages, which we describe below, of the out-of-service-area proposal while TWE seeks to divest its subject cable systems. We conclude that a waiver is necessary to permit prompt and efficient implementation of the proposal.

9. We believe that there are significant potential benefits to be gained from swift implementation of innovative telecommunications services to cable subscribers proposed by petitioners. As petitioners have stated, the proposed venture is designed to take advantage of USWC's expertise in switching and two-way telecommunications and TWE's cable programming experience to launch broadband interactive services networks by upgrading TWE cable systems located outside USWC's telephone service areas. The concerns underlying the cross-ownership prohibition are less pronounced where the telephone company is involved in providing cable service outside its service area. In fact, telephone company investment in cable television outside its region is likely to increase competition for traditional telephone services, and to expand consumer choices.

10. The Communications Act presumes that the provision of new technologies and services to the public is in the public interest.[20] In addition, the Commission has found the public interest is served by the development of an advanced telecommunications infrastructure.[21] Deploy-

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[10] Petition at 4, 9.

[11] Petition at 9.

[12] Petition at 9-10; Reply Comments at 2.

[13] USTA Comments at 5-6.

[14] USTA Comments at 4-5. No other comments or petitions were filed.

[15] *National Cable Television Association, Inc. v. Federal Communications Commission and United States of America*, ("*NCTA v. FCC*") 914 F.2d 285, 287 (D.C. Cir. 1990), *rehearing denied*, No. 89-1517, December, 1990; *see also* S. Rep. No. 102-92, 102d Cong., 1st Sess. 17 (1991), *reprinted in* 1992 U.S. Code Cong. & Ad. News 1133, 1150.

[16] Clarification and Notice of Proposed Rulemaking (*Clarification*) in Docket No. CC 78-219, 69 FCC 2d 1097, 1111 (1978).

[17] *See, e.g., Pacific Bell, supra; Concord Telephone Exchange, Inc.*, 78 FCC 2d 676 (1980); *Clarification* at 111.

[18] *See NCTA V.* FCC, 914 F.2d at 286-87; 47 U.S.C. §533(b)(4).

[19] *Pacific; Lake Telephone Company; Fort Mill Telephone Company; see also Golden West Associates, L.P.*, 59 RR 2d 125, 132 (1985).

[20] *See, e.g.*, 47 U.S.C. §§ 1, 7.

[21] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, 5787 (1992)(*Video Dialtone Order), pets for recon. pending, appeal pending sub nom., Mankato Citizens Telephone Company et al. v. FCC*, No. 92-1404 *et al.*, (D.C. Cir. Sept. 9 1992).

ment of networks like FSNs will offer consumers additional choices and should lead to additional competition among suppliers of telecommunications products and services. Because the capacity of FSNs will be significantly higher than that of existing cable television systems, suppliers of both traditional and interactive programming will have additional access to consumers, likely increasing competition in the program supply market. Existing transmission service suppliers, such as local telephone companies, will have additional incentives to upgrade their facilities to provide additional capabilities for customers if warranted by market demand for FSN services. Likewise, equipment suppliers will have additional opportunities, leading to economic growth. We find that grant of a temporary waiver under the instant circumstances would advance these important public policy goals and therefore is in the public interest.

11. We also concur with petitioners that denial of a waiver would likely result in cable service disruption to TWE affiliated cable service subscribers. Denial of a temporary waiver would place TWE cable subscribers at risk of losing service for lack of a buyer for the eight TWE cable systems now on the market. Petitioners note that TWE has already sold four cable systems in the US West service area, and that negotiations are continuing for the remaining eight systems. The requested 18 month waiver would permit TWE to continue negotiations for orderly transfer and sale of the remaining cable systems in the US West telephone exchange service areas. This amount of time is consistent with the time we have allowed for divestiture in other settings involving cross-ownership.

12. In considering a request for waiver of the cross-ownership prohibition, the Commission must address whether a waiver is "justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection." 47 U.S.C. § 533(b)(4). Thus, in addition to the public interest benefits described above, we must also consider the policies underlying the cross-ownership provision, which involve concerns that telephone companies might use their control of telephone facilities to prevent or hinder competition by independent cable operations,[22] and that telephone companies might cross-subsidize the provision of video programming by imposing the costs of that activity on telephone ratepayers.[23] TWE's expressed intention is to divest itself of all cable interests it holds in telephone exchange service areas served by USWC. TWE has already partially divested cable interests which would place the parties in violation of the rules, and has clearly indicated that it seeks only to effect the complete divestment of such interests. In that TWE, and by extension USWC, is actively seeking to discontinue its provision of cable service in the relevant area, any potential threat to competition in the provision of cable service in the USWC service area will be temporary. Moreover, we believe our existing accounting rules and policies are sufficient to ensure that the requested waiver will not result in improper cross-subsidization during the maximum of 18 months required for divestiture.[24] The TWE interests are being acquired by a subsidiary corporation of USWC, USWCC. Our joint cost and affiliate transaction rules are designed to ensure that any telephone company resources used to support TWE activities will be properly accounted for.[25] Given the facts before us, particularly the separate corporate structure of the cable television and regulated telephone activities, we find no need for special conditions to support grant of the request waiver.

VI. CONCLUSION

13. For the foregoing reasons, we believe that the public interest benefits associated with a grant of the requested temporary waiver outweigh the public policy concerns associated with the cross-ownership ban. Thus, grant of the requested waiver is consistent with our stated policies for encouraging innovation and competition in the telecommunications marketplace directly benefitting subscribers, and ensuring that neither cable nor telephone company subscribers are harmed as a result of the grant of a limited temporary waiver of the cross-ownership restrictions. Moreover, grant of the waiver is necessary for the public interest benefits of the overall transaction to be achieved promptly. Accordingly, we grant the petition of TWE and USWC for a temporary waiver of the restrictions on telephone company involvement in video programming in its USWC's telephone service area, not to exceed 18 months from the effective date of this decision.

VII. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that the petition of Time Warner Entertainment, L.P., and U S West Communications, Inc. IS GRANTED.

15. IT IS FURTHER ORDERED, pursuant to 47 U.S.C. § 533(b)(4) and 47 C.F.R. § 63.56, that the telephone company/cable television cross-ownership restrictions codified at 47 U.S.C. § 533(b)(1) and 47 C.F.R. § 63.54 ARE WAIVED to the extent indicated above.

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[22] *NCTA v. FCC* at 289.

[23] Blanket Section 214 Authorization for Provision by a Telephone Common Carrier of Lines for its Cable Television and Other Non-Common Carrier Services Outside its Telephone Service Area, *Report and Order*, 98 F.C.C. 2d 354, 358 and n.6 (1984) (requiring separate books of account for non-common carrier offerings by common carriers).

[24] Since our 1984 order imposing a condition for separate accounts for noncommon carrier activities by telephone companies, we have revised our accounting policies. The Commission's system of cost accounting requirements includes (1) rules governing cost allocation and affiliate transactions; (2) the filing and staff review of cost allocation manuals (CAMs); (3) annual cost allocation audits of large telephone companies, including USWC, by independent auditors, and staff review of these audits; (4) reporting of detailed cost allocation data in the Automated Reporting and Management Information System (ARMIS); and (5) staff audits of carriers. Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions between telephone Companies and their Affiliates, Report and Order, 2 FCC Rcd 1298 (1987), *recon.* 2 FCC Rcd 6283 (1987), *modified on further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom.*, Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[25] *See* 47 C.F.R. Secs. 64.902, 32.27.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 15, 1993

AT&T AND McCAW CELLULAR COMMUNICATIONS, INC. SEEK FCC CONSENT FOR PROPOSED MERGER PLEADING CYCLE ESTABLISHED

American Telephone and Telegraph Company (AT&T) and Craig O. McCaw (McCaw) have filed applications under Sections 214(a) and 310(d) of the Communications Act, 47 U.S.C. §§ 214(a), 310(d), for Commission consent to transfer control to AT&T of radio licenses and other authorizations held or requested by McCaw Cellular Communications, Inc., (MCCI) and its subsidiaries and controlled partnerships. This transfer of control would take place as a result of the proposed merger of AT&T and MCCI. After the proposed merger, MCCI would become a wholly-owned subsidiary of AT&T and the authorizations currently held by MCCI and its subsidiaries and controlled partnerships would continue to be held by those entities. MCCI owns, operates and controls various cellular radio telephone systems, paging systems, common carrier point-to-point microwave systems, air-to-ground systems, marine maritime systems, broadcast stations, and private radio systems.

AT&T and McCaw (Applicants) said that the proposed merger would enable MCCI subsidiaries to become more effective competitors to the Regional Bell Operating Companies (RBOCs) and other wireline carriers, have no adverse effect on competition in any market, more rapidly bring the public the benefits of improved cellular service and new communications capabilities, and thus serve the public interest.

While the following file numbers have been assigned to various applications, File No. ENF-93-44 has been assigned to these proceedings for purposes of overall reference and coordination. Applicants seek consent to transfer control over the following authorizations:

COMMON CARRIER RADIO LICENSES

DOMESTIC PUBLIC CELLULAR RADIO TELECOMMUNICATIONS SERVICE

Applications for consent to transfer control from McCaw to AT&T of the cellular radio service authorizations held or requested by the following MCCI subsidiaries or controlled partnerships. The file number noted below has been assigned to the lead application of the 112 applications filed in this service.

Interstate Mobilephone Company, Market No. 20A (File No. 05288-CL-TC-1-93)

ACC/McCaw Cellular of Fresno, Market No. 74A

ACC/McCaw Cellular of Fresno, Market No. 75A

ACC/McCaw Cellular of Minneapolis

ACC/McCaw Cellular of Sacramento

ACC/McCaw Cellular of San Antonio

Affiliated Cellular of Minnesota, Inc.

Alpine CA-3, L.P.

Bay Area Cellular Telephone Company, Market No. 7A

Bay Area Cellular Telephone Company, Market No. 27A

Bayfone of Tampa

Bellingham Cellular Partnership

Boise Cellular Services, Inc.

Boise City Cellular Partnership

Bradenton Cellular Partnership

Bremerton Cellular Telephone Company

B-CS Cellular Telephone Company, Inc.

Cagal Cellular Communications Corporation

Cellular Alaska Partnership, Market No. 187A

Cellular Alaska Partnership, Market No. 316A

Cellular Telephone Company

CMT Partners

Colorado High Country Cellular Limited Partnership

Corpus Christi Cellular Telephone Company

Denver Cellular Telephone Company

Erie Cellular Telephone Company

Eugene Cellular Telephone Company, Inc., Market No. 135A

Eugene Cellular Telephone Company, Inc., Market No. 611A

Florida 4 Cellular, Inc.

Fort Collins-Loveland Cellular Telephone Company

Galveston Cellular Telephone Company

Greeley Cellular Telephone Company

Houston Cellular Telephone Company

Interstate Mobilephone Company, Market No. 30A

Interstate Mobilephone Company, Market No. 82A

Interstate Mobilephone Company, Market No. 699A

Jacksonville Cellular Telephone Company

Lafayette Cellular Telephone Company

Lakeland/Winterhaven

Cellular Telephone Company

LIN Cellular Communications Corporation, Market No. 668A

LIN Cellular Communications Corporation, Market No. 657A

Litchfield Acquisition Corporation

Little Rock Cellular Partnership, Market No. 92A

Little Rock Cellular Partnership, Market No. 33A

Longview Cellular, Inc.

Los Angeles Cellular Telephone Company

Maui Cellular Telephone Company, Inc.

McCaw Communications of Colorado Springs, Inc.

McCaw Communications of Daytona Beach, Inc.

McCaw Communications of Florida, Inc., Market No. 12A

McCaw Communications of Florida, Inc., Market No. 370A

McCaw Communications of Fort Pierce, Inc., Market No. 208A

McCaw Communications of Fort Pierce, Inc., Market No. 361A

McCaw Communications of Johnstown, Inc.

McCaw Communications of Killeen-Temple, Inc., Market No. 160A

McCaw Communications of Killeen-Temple, Inc., Market No. 661(A2)

McCaw Communications of Modesto, Inc.

McCaw Communications of Nevada, Inc.

McCaw Communications of Oklahoma City, Inc.

McCaw Communications of Stockton, Inc.

McCaw Communications of Waco, Inc.

Medford Cellular Telephone Company, Inc.

Melbourne Cellular Telephone Company

Metroplex Telephone Company, Market No. 94A

Metroplex Telephone Company, Market No. 661A

MFC, Inc.

Midwest Cellular Telephone Company

Monroe Cellular Limited Partnership

Napa Cellular Telephone Company

Ocala Cellular Telephone Company, Inc.

Ocean County Cellular Telephone Company

Olympia Cellular Telephone Company, Inc.

Orlando Cellular Telephone Company

Oxnard Cellular Telephone Company

Palm Beach County Cellular Telephone Company

Parkersburg Cellular Telephone Company, Inc.

Pine Bluff Cellular, Inc.

Pittsburgh Cellular Telephone Company

Provo Cellular Telephone Company

Pueblo Cellular Communications, Inc.

Redding Cellular Partnership

Reno Cellular Telephone Company, Market No. 171A

Reno Cellular Telephone Company, Market No. 545A

Rochester CellTelCo, Market No. 288A

Rochester CellTelCo, Market No. 492A

RSA #343, Inc.

RSA 673 Cellular, Inc.

RSA 697 Cellular, Inc.

RSA #698 Cellular, Inc.

Salem Cellular Telephone Company

Salinas Cellular Telephone Company

Salt Lake City Cellular Telephone Company

Santa Barbara Cellular Systems, Ltd.

Sarasota Cellular Telephone Company

Sherman-Denison Cellular Telephone Company, Inc.

Shreveport Cellular Telephone Company

Simmons Cellular of Washington, Inc.

Spokane Cellular Telephone Company

St. Cloud Cellular Telephone Company, Inc.

St. Joseph CellTelCo

Talcom, Inc.

Texarkana Cellular Partnership

Tri-Cities Cellular Services, Inc.

Tulsa Cellular Telephone Company, Market No. 57A

Tulsa Cellular Telephone Company, Market No. 599A

TWR Cellular, Inc., Market No. 165A

TWR Cellular, Inc., Market No. 182A

Visalia Cellular Telephone Company

Wheeling Cellular Telephone Company

Wichita Falls CellTelCo

Yakima Cellular Telephone Company

Yuba City Cellular Telephone Company

DOMESTIC PUBLIC 800 MHz AIR-GROUND RADIOTELEPHONE SERVICE

Application for consent to transfer control from McCAW to AT&T the domestic public 800 MHz Air-Ground Radiotelephone authorization held by Claircom Communications Group, L.P., File No. 28159-CG-TC-1-93. This application incorporates by reference exhibits included in the application for transfer of control of Interstate Mobilephone (File No. 05288-CL-TC-1-93), noted above.

DOMESTIC PUBLIC LAND MOBILE RADIO SERVICES

File Nos. 28145-CD-TC-1-93 through 28157-CD-TC-1-93. Applications for consent to transfer control from McCaw to AT&T of the DPLMRS authorizations held or requested by the following MCCI subsidiaries. These applications incorporate by reference exhibits included in the application for transfer of control of Interstate Mobilphone Company (File No. 05288-CL-TC-1-93), noted above.

Airsignal of California, Inc. (File No. 28145-CD-TC-1-93)

McCaw 900 MHz Communications, Inc. (File No. 28153-CD-TC-1-93)

McCaw Communications of Portland, Inc. (File No. 28150-CD-TC-1-93)

McCaw Paging One, Inc. (File No.28146-CD-TC-1-93)

McCaw RCC Communications of Kansas City, Inc. (File No. 28148-CD-TC-1-93)

McCaw RCC Communications of the Midwest, Inc. (File No. 28149-CD-TC-1-93)

McCaw RCC Communications of Utah, Inc.

(File No. 28151-CD-TC-1-93)

McCaw RCC of Colorado, Inc.

(File No. 28147-CD-TC-1-93)

McCaw RCC of Wichita, Inc.

(File No. 28152-CD-TC-1-93)

Mobilefone Service, Inc.

(File No. 28154-CD-TC-1-93)

Radio Communications, Inc.

(File No. 28155-CD-TC-1-93)

Vegas Instant Page, Inc.

(File No. 28157-CD-TC-1-93)

Western Telepage, Inc.

(File No. 28156-CD-TC-1-93)

DOMESTIC PUBLIC FIXED RADIO SERVICES

Applications for consent to transfer control from McCaw to AT&T of point-to-point microwave radio authorizations and local television transmission service authorizations held or requested by the following MCCI subsidiaries or controlled partnerships. The file number noted below has been assigned to the lead application of the 23 applications filed in this service.

Cellular Alaska Partnership (File No. 9313208)

ACC/McCaw Cellular of Fresno

ACC/McCaw Cellular of Minneapolis

Alpine CA-3, L.P.

CMT Partners

Denver Cellular Telephone Company

Eugene Cellular Telephone Company, Inc.

Galveston Cellular Telephone Company

Houston Cellular Telephone Company

Los Angeles Cellular Telephone Company

McCaw Communications of Daytona Beach, Inc.

McCaw Communications of Florida, Inc.

McCaw Communications of Nevada, Inc.

McCaw Communications of Oklahoma City, Inc.

McCaw Communications of the Mid-South, Inc. (File No. 9313214)

McCaw Communications of the Mid-South, Inc. (File No. 9313239)

McCaw Communications of Waco, Inc.

McCaw RCC Communications, Inc.

Mobilefone Service, Inc.

Pittsburgh Cellular Telephone Company

Radio Communications, Inc.

RSA 697 Cellular, Inc.

Vegas Instant Page, Inc.

Wichita Falls CellTelCo

Western Telepage, Inc.

DOMESTIC FIXED SATELLITE SERVICES

Applications for consent to transfer of control from McCaw to AT&T of earth stations licenses held by the following MCCI subsidiaries. The applications incorporate by reference exhibits included in the application for transfer of control of Cellular Alaska Partnership (File No. 9313208), noted above.

	Call Signs
Indiana Broadcasting Corporation	
(File No. 3135-DSE-TC-93)	E900626
KXAN, Inc.	
(File No. 3134-DSE-TC-93)	E910002
LCH Communications, Inc.	
(File No. 3133-DSE-TC-93)	E900983
Northern Texas Broadcasting Corporation	
(File No. 3130-DSE-TC-93)	E891022
WAVY Television, Inc.	
(File No. 3129-DSE-TC-93)	E891021

SECTION 214 AUTHORIZATION

File No. I-T-C-93-308 (TC). Applicants also seek FCC consent to transfer control over Continental Intercell, Inc., a MCCI subsidiary, authorized under Section 214 of the Communications Act to provide international service through resale of services provided by other carriers.

REQUEST FOR EXEMPTION

Applicants have requested an exemption from the "cut-off" requirements that affect Part 21 and Part 22 major amendments. Section 21.23(c)(6), 47 C.F.R. § 21.23(c)(6), states that a change of ownership will be considered a major amendment to an application unless the "transfer of control is for legitimate business purposes other than the acquisition of applications." Section 22.23(g)(3), 47 C.F.R. § 22.23(g)(3), states that such a change will constitute a major amendment unless it "reflects only a change in ownership or control found by the Commission to be in the public interest, and for which a requested exemption from the cut-off requirements of § 22.31 is granted."

PRIVATE RADIO AUTHORIZATIONS

PRIVATE OPERATIONAL FIXED MICROWAVE SERVICE

Applications for consent to transfer control from McCaw to AT&T of private operational fixed microwave station licenses held by the following MCCI subsidiaries. The individual file numbers noted below have been assigned to the named licensees.

Licensee	Call Signs
KXAN, Inc. (File No. 902786)	WNTJ-851, WNTJ-852
LCH Communications, Inc. (File No. 902787)	WNEM-522

TELEVISION STATION AUTHORIZATIONS

Applications for consent to transfer control from McCaw to AT&T of television station authorizations held or controlled by MCCI subsidiaries.

FILE NUMBER	CALL LETTER	LOCATION
BTCCT-930823KE	KXAS-TV	FORT WORTH, TX
BTCCT-930823KF	WISH-TV	INDIANAPOLIS, IN
BTCCT-930823KG	WOOD-TV	GRAND RAPIDS, MI
BTCCT-930823KH	WAVY-TV	PORTSMOUTH, VA
BTCCT-930823KI	KXAN-TV	AUSTIN, TX
BTCCT-930823KJ	WAND (TV)	DECATUR, IL
BTCCT-930823KK	WANE-TV	FORT WAYNE, IN
BTCCT-930823KL	KXAM-TV	LLANO, TEX
BTCTT-930823KM	W68AA	DANVILLE, IL
BTCTTL-930823KN	K21DK	GIDDINGS, TX
BTCTTL-930823KO	K32DA	LAGRANGE, TX
BTCTTL-930823KP	K40CT	SAN MARCOS, TX
BTCTTL-930823KQ	K49CY	AUSTIN, TX
BTCTTL-930823KR	W11BV	INDIANAPOLIS, IN
BTCTTL-930823KS	W22BG	ELIZABETH CITY, NC
BTCTTL-930823KT	W36BK	MAPPSVILLE, VA
BTCTTL-930823KU	W59CE	HAMPTON, VA
BTCTTL-930823KV	W66BZ	SUFFOLK, VA
BTCTTL-930823KW	W69CV	SUFFOLK, VA

GENERAL INFORMATION

The transfer of control requests listed herein have been found, upon initial review, to be acceptable for filing. The Commission reserves the right to return any application if, upon further examination, it is determined to be defective and not in conformance with the Commission's rules or policies.

Final action will not be taken on these applications earlier than 31 days following the date of this notice, except for radio applications not requiring a 30-day notice period (Section 309(c) of the Communications Act). Parties wishing to file petitions to deny or formal petitions for other forms of relief, and other persons wishing to file comments must do so no later than November 1, 1993. Oppositions to petitions and other reply comments should be filed no later than December 2, 1993. Replies to Oppositions to Petitions to Deny should be filed no later than December 15, 1993. All filings concerning any or all of the matters referenced in this Public Notice should refer to File No. ENF-93-44 as well as reference specific file numbers of the individual applications or other matters to which the filings pertain. A copy of the applications and any subsequently filed document in this matter may be obtained from International Transcription Service, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. The applications and documents also are available for public inspection and copying during normal reference room hours at the following Commission offices: Room 628, 1919 M Street, N.W., Washington, D.C. (Part 22 applications); Room 533, 1919 M Street (Sec. 214 application); Room 6220, 2025 M Street, N.W., Washington, D.C. (Domestic Fixed Satellite Service applications); Licensing Division, 1270 Fairfield Road, Gettysburg, Pa. 17325 (717) 337-1421 (Domestic Public Fixed Radio Services applications and Private Operational Fixed Microwave Service applications). For further information, contact Adrien Auger at (202) 632-4887 or James Loughry (202) 632-6450 (Part 22 applications), Jeanette Spriggs (202) 634-1843 (Domsat applications), Troy Tanner (202) 632-7265 (international resale Section 214 application), Anne Lucey (202) 632-6357 (broadcast station applications).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286

In the Matter Of

Amendment of Part 36 of The
Commission's Rules And
Establishment of a Joint Board

NOTICE OF PROPOSED RULEMAKING

Adopted: September 13, 1993; Released: September 14, 1993

Comments: October 6, 1993
Reply Comments: October 15, 1993

By the Commission:

I. INTRODUCTION

1. This Notice of Proposed Rulemaking (*"Notice"*) focuses upon proposed interim rule changes involving the Universal Service Fund ("USF"). For the specific and limited purpose of moderating USF growth, we propose interim modifications of our USF high cost assistance mechanisms.[1] Those interim modifications would remain in effect for a limited time period while we pursue a rulemaking on a broad spectrum of USF issues.

2. As we discuss briefly below, we believe that the time has arrived to re-examine the USF mechanisms to determine whether changes need to be made in the current rules in order to serve our underlying public policy goals most effectively. We therefore intend to propose, in the near future, broader changes in the USF rules contained in Part 36 of our rules. At this time, we refer the general issue of changes in the Part 36 rules governing the USF, as well as the specific interim issues raised in this *Notice*, to the Federal State Joint Board in this proceeding. We intend to issue a further notice of proposed rulemaking, addressing possible permanent changes in the Part 36 USF rules, within the next few months.

3. We expect that a full examination of USF issues will be extremely complex, both in terms of balancing various public policy concerns and in terms of analyzing extensive data regarding current and proposed USF mechanisms. Due to the complexity of the issues and the time consuming nature of that task, the USF rulemaking may continue for a significant length of time. We are concerned that continuing under the current rules during the pendency of that proceeding would exacerbate problems with the USF mechanisms. Specifically, we fear that further unchecked growth in the USF could work at cross-purposes with our eventual reformulation of the USF and its high cost support mechanisms.

4. In this *Notice*, we propose to adopt interim measures to moderate growth of the USF during the pendency of our broader USF rulemaking. These measures would be implemented through the adoption of interim Part 36 rules of specific and limited duration. The interim rules would be in place for a two-year period, beginning on January 1, 1994.[2] We believe that two years should be sufficient to conclude a rulemaking on the full range of USF issues. We are referring the issue of appropriate interim Part 36 USF rules to the Federal State Joint Board for evaluation and recommendation.

5. We request comment upon two basic alternative approaches for the interim USF rules, as discussed below. In addition, we invite comment proposing other alternatives for moderating growth in the overall size of the USF during the interim period.

6. New USF tariffs generally go into effect at the beginning of each year; it therefore would be desirable to have new interim USF rules in place by January 1, 1994. For that reason, and because we are proposing interim rules of limited duration, we are setting a relatively short comment cycle. Comments will be due on October 6, 1993, and reply comments will be due on October 15, 1993.

II. BACKGROUND

A. A Brief History of the Universal Service Fund

7. In 1984, the Federal State Joint Board recommended, and we adopted, new rules creating the USF in order to preserve and promote universal telephone service.[3] The USF functions by allowing local exchange carriers ("LECs") with a high cost per loop[4] to allocate a portion of that cost to the interstate jurisdiction,[5] thus allowing the states to establish lower local exchange rates in those areas. Eligibility for high cost assistance from the USF is assessed

[1] Part 36, Subpart F of our rules. 47 C.F.R. §§ 36.601 through 36.641 (1992).

[2] If our full USF rulemaking is concluded and new rules can be placed in effect before the expiration of the two-year interim period on January 1, 1996, the interim rules proposed in this notice would be replaced by the new permanent rules.

[3] Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 96 FCC2d 781 (1984).

[4] The basis for a LEC study area's receipt of high cost assistance is its "average unseparated loop cost per working loop," 47 C.F.R. §36.631 (1992), a term which is defined in 47 U.S.C. §36.622 (1992). Hereinafter in this *Notice* we shall refer to such cost as "cost per loop."

The cost per loop for a study area is calculated by dividing the total unseparated loop costs within that study area by the study area's total number of working loops. 47 C.F.R. §36.622(b)(1992). Total unseparated loop costs include the return component, depreciation expense, maintenance expense, and corporate operations expenses attributable to certain subcategories of cable and wire facilities and circuit equipment. 47 C.F.R. §36.621 (1992). We shall refer to the total unseparated loop costs as "total loop costs."

[5] *See* 47 C.F.R. §36.631 (1992). The amount of a LEC's total loop costs which are allocated to the interstate jurisdiction under the USF rules is in addition to the regular interstate allocations of such costs under our general separations rules.

separately for each LEC study area, and the threshold for such assistance is 115 percent of the national average cost per loop.[6]

8. The USF rules contain a sliding scale, pursuant to which the highest cost study areas receive a greater degree of assistance than study areas whose cost per loop is only slightly above the threshold. Although all study areas with costs per loop in excess of the threshold receive high cost assistance from the USF, study areas with the highest costs per loop are able to allocate the greatest percentage of those costs to interstate.[7]

9. We determined that the USF should be phased in over an eight-year transition period.[8] Implementation began in 1986, with 1/8 of the total USF amount calculated for that year collected from interexchange carriers and distributed to LECs with high cost study areas. Beginning in 1993, USF payments by interexchange carriers and USF assistance to high cost LECs are at the full support level.

10. In 1987, the Joint Board recommended that we shift USF assistance from large study areas to smaller study areas. The Joint Board determined that small LECs are in greater need of assistance than large LECs.[9] Moreover, the Joint Board predicted that the recommended targeting would decrease the overall size of the USF.[10] We therefore adopted the Joint Board's recommendation for retargeting USF assistance.[11] Under the revised rule, effective January 1, 1988, USF assistance per loop was reduced for large study areas and increased for small study areas.[12]

B. Need for Interim Action

11. Growth in the USF has been pronounced during the past eight years. If the USF had been fully phased-in in 1986, the first year of the USF transition, the fund total would have been approximately $445 million;[13] in 1993, at the conclusion of the transition period, the USF total is at least $704 million,[14] and possibly more.[15]

12. The full-transition amount of the USF has thus increased by approximately $260 million since 1986, a total percentage increase of nearly 60 percent and an annualized percentage increase of approximately seven percent. We are concerned about the substantial increase in the burden upon interstate telecommunications attributable to growth in the USF. Moreover, we believe that a legitimate issue exists as to whether USF growth of this magnitude is essential to carry out our original intent to further universal telephone service through a system of assistance to high cost study areas.

13. In addition to the overall size of the USF, we also are troubled by the wide fluctuations in the rate of USF growth from year to year. While in some years growth in the USF has been minimal, in other years the fund has increased more than ten percent over the prior year.[16] During the past five years, the rates of annual USF growth have ranged from approximately one percent to more than 19 percent.[17]

14. The pronounced increase in the full-transition level of the USF and the erratic pattern of growth in the fund raise important questions regarding the USF support mechanisms contained in our rules. We therefore believe that the time has arrived to re-examine the USF high cost assistance mechanism, both in terms of the total size of the USF and the effectiveness of the fund's current targeting of high cost assistance. We intend to initiate a rulemaking addressing those issues in the very near future.

15. During our rulemaking on the full panoply of USF issues, we shall address the erratic nature of USF growth which has taken place under the current rules. For the present, however, there is no explanation for past surges in the USF level. Consequently, we can have no confidence that similar pronounced increases in the USF will not occur even as we are in the process of studying and revising the high cost mechanisms. For that reason, we believe it is appropriate to consider interim rules to hold USF growth to a moderate rate during the pendency of our rulemaking.

16. Adopting interim measures to moderate USF growth while we study and revise the fund's assistance mechanisms will enhance our ability to revise the current rules without harm to the fund, carriers contributing to it, or the carriers in greatest need of high cost assistance. Interim rules designed to address the USF growth rate will prevent excessive USF increases that could work at cross-purposes to our efforts to revise the high cost support mechanisms. In addition, interim rules that moderate USF growth could also moderate the effect upon individual carriers of eventual retargeting of USF assistance.

For most of the facilities considered part of loop investment, 25 percent of their costs are allocated to the interstate jurisdiction pursuant to a gross allocation factor. 47 C.F.R. §36.154 (1992).

[6] 47 C.F.R. §36.631 (1992).

[7] *See* note 12, *infra*.

[8] MTS/WATS Market Structure and Amendment of Part 67 of the Commission's Rules, 50 Fed. Reg. 939 (1985). *See also* "Recommended Decision and Order," MTS and WATS Market Structure/Amemdment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 2 FCC Rcd 2324, 2334 (1987) at ¶88. During the final year of the transition period, the full support level is in effect.

[9] "Recommended Decision and Order," MTS and WATS Market Structure/Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 2 FCC Rcd 2324, 2334, ¶86 (1987).

[10] *Id.* at 2333, ¶75.

[11] MTS and WATS Market Structure/Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 2 FCC Rcd 2953 (1987).

[12] For study areas with 200,000 or fewer loops, the additional interstate allocation of loop costs is 65 percent of such costs between 115 and 150 percent of the national average and 75 percent of such costs in excess of 150 percent of the national average. 47 C.F.R. §36.631(c) (1992). For study areas with greater than 200,000 loops, the additional interstate allocation allowed under our rules is ten percent of loop costs between 115 and 160 percent of the national average, 30 percent of such costs between 160 and 200 percent of the national average, 60 percent of such costs between 200 and 250 percent of the national average, and 75 percent of all such costs in excess of 250 percent of the national average. 47 C.F.R. §36.631(d) (1992).

[13] Monitoring Report, CC Docket No. 87-339, at 74 (May 1993).

[14] *Id.*

[15] Data submitted by the National Exchange Carrier Association ("NECA") in CC Docket No. 93-123 (filed July 21, 1993) indicates that the total level of payments into the USF during 1993 will be approximately $741 million.

[16] *See* Monitoring Report, *supra*, at 74. Our calculations of the USF growth rates are based upon the data for projected USF payments at full transition.

[17] *Id.*

17. We therefore propose the adoption of interim rules, as discussed below, that would remain in effect for two years[18] while we undertake a revision of the USF assistance mechanisms. Moreover, we emphasize that we do not intend, at this time, to resolve the issue of whether the rate of USF growth should be subject to *permanent* indexing or control. In this *Notice*, we propose only to implement interim rules to prevent excessive growth in the USF during the pendency of a full USF rulemaking.

III. ALTERNATIVES FOR INTERIM RULES

18. Our primary objective in considering the adoption of interim changes in our USF rules is to moderate growth in the overall size of the fund. Nonetheless, while we believe that it is important to control USF growth as we evaluate and revise the current high cost mechanisms, we are concerned about the effect of any interim measures upon carriers and study areas most in need of assistance. To the extent possible, we want to avoid substantial decreases in the assistance provided to extremely high cost study areas.

19. We are proposing two basic approaches for ensuring reasonable USF growth: an indexed threshold for USF assistance and an indexed cap on the total level of the USF. We request comment comparing the effectiveness of the proposed approaches in moderating USF growth during the two-year interim period. We also seek comment regarding the likely effects of the two approaches upon recipients of high cost assistance. Finally, we invite comment proposing other alternatives for moderating growth in the overall size of the USF during the interim period.

A. Indexed Threshold for USF Assistance

20. One means of moderating the rate of USF growth over the next two years would be to determine each year's nationwide average cost per loop by indexing the prior year's average cost per loop to the rate of growth in the average cost per loop for non-price-cap carriers. This would have the effect of indexing the USF threshold to the growth in cost per loop for non-price-cap LECs. In recent years, the growth in the cost per loop for the carriers which are not currently subject to price caps has exceeded considerably the growth in average cost per loop for all LECs.[19] We expect that the recent implementation of price caps may further increase that cost disparity, as price cap carriers seek to exert greater control over their costs in response to the regulatory incentives inherent in price cap regulation. Thus, indexing the threshold for high cost assistance could prevent, during the interim period, increases in USF growth due in part to the differing regulatory incentives of price cap and non-price-cap LECs.

21. More important, we believe that indexing the threshold for assistance could avoid significant adverse effect upon the highest cost study areas most in need of support while accomplishing our intended goal of moderating USF growth. Assuming that the rate of growth in the cost per loop for non-price-cap carriers continues to exceed the nationwide average growth rate for all LECs, the proposed indexed threshold would be higher than the threshold for assistance calculated under our existing rules. Consequently, we expect that the use of this proposed method would cause the USF to grow less rapidly than under the current rules. At the same time, the dollar increase in the threshold would be fairly small and thus would affect primarily study areas whose costs are only slightly above the current threshold. The highest cost study areas would not experience a significant decrease in USF assistance in relation to the prior year. We seek comment upon the effectiveness of the indexed assistance threshold in achieving our stated goals.

B. Indexed Cap on Total USF Level

22. The second potential approach for limiting USF growth on an interim basis would be to cap the current level of the USF and allow the fund to grow at a moderate rate. That rate could either be predetermined at the outset or established by the selection of an appropriate indexing factor. We propose, for this option, to use as an indexing factor the rate of growth in national total working loops.[20] The annual USF cap would be derived by applying the rate of growth in total working loops to the prior year's USF level.

23. We believe that using the rate of growth in total working loops as the index factor for total USF growth could constitute a reasonable approach for several reasons. First, the rates of growth in total working loops have been moderate and reasonably consistent over the past few years. Data filed by NECA in support of its annual tariff filings indicate growth in total nationwide loops[21] ranged from two to 3.6 percent from 1984 to 1991, the most recent year for which data are available. All of those rates of increase, and the associated dollar amounts, are moderate enough to fulfill our goal of avoiding large increases in the USF during the two-year interim period while our full-scale USF rulemaking is in progress. In addition, because the rates of growth in the total number of working loops have not varied to any extreme degree during recent years, this would offer assurance that during the two-year interim period we could avoid the erratic surges in USF levels which have occurred under the current rules.

24. In order to determine whether use of the cap would be required in a given year, it would first be necessary to calculate the total USF amount using the existing rules and compare that total with the indexed USF cap for that year. If the existing rules produced a total USF no greater than the capped amount, no further action would be necessary. If, however, the USF total calculated under the existing rules exceeded the indexed USF cap, the next step would be to adjust the individual USF payments so that the total payments would equal the capped level. We wish to consider two alternative means of implementing an indexed cap for the USF.

25. The first alternative method would involve calculating what the USF assistance level for each recipient carrier would have been under the current rules and then adjusting each recipient's support proportionately to achieve the

[18] The interim rules could be replaced by new rules in less than two years if we complete the broader USF rulemaking ahead of the anticipated two-year time frame. *See* discussion, *supra* at note 2.

[19] The cost per loop for LECs not subject to price caps has grown from $256 to $334 since the inception of the USF program. This is an average annual growth rate of 3.9 percent. For the same period, the nationwide average cost per loop has grown from $213 to $234, an annual growth rate of only 1.4 percent.

[20] As defined in 47 C.F.R. §36.611(a)(8) (1992).

[21] For USF purposes. *See* 47 C.F.R. §36.611(a)(8) (1992).

level of the indexed cap. The second method would require adjusting the threshold amount for high cost assistance to a level producing a total USF at the indexed cap level. In practice, this method would involve adjusting the nationwide average cost per loop so that total USF assistance would equal the indexed USF cap. As with the indexed threshold method discussed earlier, this second approach could have the advantage of ensuring that the highest cost study areas do not experience a significant decrease in support.

26. We do not expect that either of these methods would have a significant adverse impact upon those small LECs most in need of USF assistance. We seek comment upon the effect which each of these two means of implementing the indexed cap approach would have on recipients of high cost assistance. In addition, we invite comment upon the overall effectiveness of the indexed cap method in controlling USF growth during the two-year interim period.

IV. PROCEDURAL MATTERS

A. *Ex Parte*

27. This is a non-restricted notice and comment rulemaking proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules.[22] In addition, under the modified *ex parte* proceedings adopted in this proceeding, no written *ex parte* presentation shall be made during the fifteen day period immediately preceding a Joint Board meeting, nor shall any oral *ex parte* presentation be made during the seven days preceding a Joint Board meeting.[23]

B. Regulatory Flexibility

28. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act.[24] Because of the nature of local exchange and access service, the Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not "small entities" as defined by that act.[25] The Secretary shall send a copy of this Order and Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of that act.[26]

C. Date for Comment

29. We invite comment on the proposals set forth above. Interested parties must file initial comments on or before October 6, 1993 and reply comments on or before October 15, 1993. To file formally in this proceeding, interested parties must file an original and four copies of all comments. If interested parties want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies.

30. Interested parties should send comments to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Service, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. We also ask that parties send a copy of their comments to each member of the Federal State Joint Board and its staff, as indicated in the attached service list. Comments will be available for public inspection during regular business in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

V. ORDERING CLAUSES

31. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i), 4(j), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 403, NOTICE IS HEREBY GIVEN of proposed interim amendments to Part 36, Subpart F of the Commission's Rules, 47 C.F.R. §36, Subpart F, as described in the Notice of Proposed Rulemaking.

32. IT IS FURTHER ORDERED, pursuant to Section 410(c) of the Communications Act of 1934, as amended, 47 U.S.C. §410(c), that the issue of permanent changes in the Commission's Part 36 USF rules, 47 C.F.R. §§36.601 through 36.641 (1992), shall be and hereby is referred to the Federal State Joint Board established in this proceeding.

33. IT IS FURTHER ORDERED, pursuant to Section 410(c) of the Communications Act of 1934, as amended, 47 U.S.C. §410(c), that the issues relating to interim amendments of the Commission's Part 36 USF rules, 47 C.F.R. §§ 36.601 through 36.641 (1992), as described in this Notice of Proposed Rulemaking, shall be and hereby are referred to the Federal State Joint Board established in this proceeding for a recommended decision.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[22] *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a) (1992).

[23] Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 89 FCC2d 36 (1982).

[24] 5 U.S.C. §601(3).

[25] *See* MTS and WATS Market Structure, 93 FCC2d 241, 338-39 (1983).

[26] 5 U.S.C. §603(a).

Federal-State Joint Board Service List

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Bell Atlantic Telephone Companies — Transmittal No. 583

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: September 20, 1993; Released: September 21, 1993

By the Associate Chief, Common Carrier Bureau:

1. On July 9, 1993, the Bell Atlantic Telephone Companies (Bell Atlantic) filed Transmittal No. 583 to restructure and increase certain nonrecurring charges (NRCs) for Telegraph, Voice Grade, WATS, DDS, and High Capacity Special Access services. In addition, Transmittal 583 establishes a Network Optimization Window (NOW), which would waive nonrecurring charges for new installations, rearrangements, and moves of channel terminations for the services listed above for a period of 120 days. Bell Atlantic states, *inter alia,* that the nonrecurring charges will be waived when a service is rearranged from one multiplexer to another "like" multiplexer in a different wire center. It claims that the 120-day waiver period would encourage customers to improve their network utilization and increase network efficiency.

2. On July 26, 1993, MFS Communications Company, Inc. (MFS) filed a petition to reject, or, alternatively, to suspend and investigate Transmittal 583. MFS argues that the reference in the tariff to "like" multiplexers may indicate that Bell Atlantic will not waive nonrecurring charges to customers that rearrange their circuits to connect to a collocator's facilities. It asks the Common Carrier Bureau to require Bell Atlantic to modify the tariff language to ensure that it does not violate the *Special Access Order.*[1] Alternatively, if Bell Atlantic will not modify the language, MFS asks the Bureau to reject, or suspend and investigate, Transmittal 583.[2]

3. Bell Atlantic replies that it considers a circuit to be a new connection whenever a customer changes carriers or location.[3] It claims that it will waive the associated channel termination nonrecurring charges for new connections if a customer changes from MFS to Bell Atlantic or from Bell Atlantic to MFS.[4] Bell Atlantic also argues that the Bureau previously rejected a similar MFS argument under similar circumstances.[5]

4. The Common Carrier Bureau has reviewed Bell Atlantic Transmittal 583, the revisions filed under Transmittal 597, and the related pleadings. We conclude that no compelling argument has been presented that the tariff revisions are patently unlawful so as to warrant rejection, and that an investigation is not warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate Bell Atlantic Tariff F.C.C. No. 1, Transmittal No. 583, filed by MFS Communications Company, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Jill Ross Meltzer
Associate Chief
Common Carrier Bureau

[1] MFS Petition at 2, *quoting* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 7 FCC Rcd 7369, 7465 (1992)(*Special Access Order)* (". . . nonrecurring reconfiguration charges must be applied in a neutral manner that does not differentiate based on whether the customer chooses to use a CAP or LEC facilities for special access services unless there are specific, identifiable cost differences.").

[2] *Id.* at 3.

[3] Bell Atlantic Reply at 2 and n.9. Bell Atlantic asserts that it incurs all the administrative costs associated with a new order.

[4] Bell Atlantic subsequently filed Transmittal No. 597 to revise and clarify the language in Transmittal 583 to show that NOW will apply to customers connecting to a collocator's facilities as well as to customers connecting to Bell Atlantic's facilities.

[5] *Id.* at 1, *citing* Pacific Bell, Revisions to Tariff F.C.C. No. 128, Trans. No. 1607, Order, 8 FCC Rcd 3227 (Com. Car. Bur. 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-503

In re Applications of

NUGGET BROADCASTING COMPANY	File No. BPH-890728MD
GEORGIA MOUNTAINS COMMUNICATIONS, INC.	File No. BPH-890728ME
KEVIN C. CROOM	File No. BPH-890728MG

For Construction Permit for a
New FM Station on Channel 282A
in Dahlonega, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: September 21, 1993; Released: October 1, 1993

By the Commission:

1. In an Initial Decision, Administrative Law Judge Edward Luton granted the application filed by Kevin C. Croom, and denied the competing applications filed by Nugget Broadcasting Company and by Georgia Mountains Communications, Inc. *Nugget Broadcasting Company*, 7 FCC Rcd 4530 (A.L.J. 1992). In doing so, the ALJ awarded 100% quantitative integration credit to Croom and Nugget, but preferred Croom over Nugget based upon his qualitatively superior integration proposal and his very slight preference for greater coverage to well-served areas and populations.

2. The Board affirmed the grant of Croom's application. It determined, however, that Croom may not rely on his current transmitter site, and that therefore Nugget has a coverage preference over Croom. *Nugget Broadcasting Company*, 8 FCC Rcd 1414 (Rev. Bd. 1993). It concluded, nevertheless, that Nugget's coverage preference is at most slight and is offset by Croom's slight integration preference, since integration has more significance under best practicable service than comparative coverage. Now before the Commission are an Application for Review, filed April 2, 1993, by Nugget Broadcasting Company, an Application for Review, filed April 5, 1993, by Georgia Mountains Communications, and a Contingent Application for Review, filed April 5, 1993, by Kevin C. Croom. Various ancillary pleadings have also been filed.[1] We agree with the Board's resolution of this case, but comment on one aspect of the Board's decision is warranted.

3. In affirming the Board's resolution of the comparative coverage issue, we agree that, in order to avoid impermissible comparative upgrading, Croom may not rely on his current coverage proposal, but must be held to his original, lesser coverage proposal. On January 8, 1990, two days before the deadline for amendments as of right,[2] Croom amended to a site significantly improving the original coverage proposal. Croom's current site, specified on June 11, 1990, offers less coverage than the January 8th site but significantly more coverage than the original site.[3]

4. At issue is which of these three coverage proposals should be considered for comparative purposes. In reversing the ALJ's reliance on the current site, the Board found (8 FCC Rcd at 1416-17 ¶ ¶ 10-11) that utilizing the June 11th site (which offers less coverage than the January 8th site but considerably more than the initial site) prejudices the competing applicants since Croom did not have reasonable assurance of the January 8th site given unresolved questions as to whether restrictive covenants would preclude its use as a transmitter site. We agree that, having failed to resolve even tentatively these questions, Croom has not made a sufficient showing of suitability to demonstrate reasonable assurance of the January 8th site on the amendment deadline, and he may therefore not rely for comparative coverage purposes on the June 11, 1990 site. Notwithstanding Nugget's claim, however, the fact that Croom did not have reasonable assurance for the January 8th site on the deadline does not require the dismissal of his application because the deficiency in the second site was not clearly foreseeable and because Croom exercised due diligence in amending to the third site once he discovered the existence of the covenants. Nor did Croom's multiple coverage proposals occasion such disruption of the

[1] On April 15, 1993, the Mass Media Bureau filed Comments. Kevin C. Croom filed a Consolidated Opposition to Applications for Review on April 19, 1993. Georgia Mountains Communications filed a Letter of Concern on April 21, 1993, and a Letter of Request on May 4, 1993. To the extent that GMC urges for the first time in the Letter of Request that Nugget's station inexplicably went dark during January 1992, this should have been promptly brought to the Commission's attention at that time, it is now untimely, and it is entitled to no further consideration. In view of our action herein affirming the Review Board's denial of Nugget's application, however, this matter is in any event moot. As to GMC's further suggestion that Croom's application is deficient, additional public notices were not required under 47 C.F.R. § 73.3580 when Croom amended its application to change its transmitter site and thereby modified its coverage proposal on January 8, and June 11, 1990, because those changes did not constitute major amendments of the application under the Commission's rules.

[2] Section 73.3522(a)(2) governs the filing of pre-designation amendments to mutually exclusive broadcast applications. It provides that such amendments may be filed as a matter of right within 30 days of the issuance of the Public Notice announcing the acceptance for filing of the last-filed mutually exclusive application, but that pre-designation amendments filed more than 30 days after the issuance of the Public Notice must be supported by good cause.

[3] By *Hearing Designation Order*, 5 FCC Rcd 7248 ¶ 3 (1990), the Bureau accepted the June 11th amendment without regard to any comparative advantage resulting therefrom. Thus, the *HDO* did not resolve, let alone provide "reasoned analysis" of, the disputed issue (i.e., which of the three proposals determines Croom's comparative coverage) in a manner that would preclude the Board's consideration of that issue. See *Revised Processing of Broadcast Applications*, 72 FCC 2d 202, 216-17 ¶ ¶ 43-46 (1979), citing *Atlantic Broadcasting*, 5 FCC 2d 717 (1966).

proceeding as to warrant overturning the *Hearing Designation Order's* finding of good cause for the June 11, 1990 site amendment.

5. Turning first to the question of reasonable assurance, Croom discovered, and reported to the Commission, prior to the amendment deadline that the January 8th site was subject to certain restrictive covenants that "may or may not render the property suitable for the applicant's purposes." Citing the land owner's continued willingness to lease the land for the erection of a broadcast tower, Croom urges that the Board's decision "elevates the standard of 'reasonable assurance' to absolute certainty, a standard never adopted or approved by the full Commission." It claims that the Board unfairly penalized it for not "establish[ing] the facts before the comparative case was frozen," and that, pursuant to *Women's Broadcasting Coalition*, 59 RR 2d 730 (1986), he should be able to rely for comparative purposes on his June 11th proposal, notwithstanding the unresolved questions concerning the restrictive covenants on the amendment deadline.

6. Without regard to whether Croom could have ultimately reached an accommodation with the adjacent landowners that would have permitted the erection of a broadcast tower on the property, he did not do so -- either before or after the amendment deadine. Croom does not claim to have even contacted, let alone reached a tentative agreement with, the adjacent property owners by the amendment deadline. This failure to reach even a tentative accommodation permitting construction of a broadcast tower on the proposed site distinguishes this case from *Women's*. There, we credited an applicant with the coverage that it would have provided as of the amendment deadline. Unlike Croom, however, the applicant in *Women's* -- who was aware of FAA problems on the last day for amendments as of right but submitted an amendment curing those problems only after the amendment deadline -- had secured reasonable assurance of the site on the amendment deadline because it had negotiated a satisfactory agreement with the airport and the FAA seemingly resolving the FAA problems. In view of this circumstance, the applicant was entitled to rely on that site for comparative purposes when that agreement unexpectedly fell apart more than a year later, necessitating its amendment to a new site with upgraded coverage. Having failed to reach even a tentative accommodation with the landowners that would allow Croom to use the land for a broadcast tower, Croom has, notwithstanding the owner's continuing willingness to lease the land, not established that he had reasonable assurance on the amendment deadline that the January 8th site could be used for its proposed purpose.[4]

7. This lack of reasonable assurance for the January 8th site on the amendment deadline does not, however, require the dismissal of Croom's application. While barred from upgrading their comparative positions after the amendment deadline, applicants otherwise demonstrating good cause may generally maintain, by amendment, comparative credit when the need for the amendment was unforeseeable. Here, the January 8th amendment was intended to upgrade, rather than cure a deficiency in, Croom's initial coverage proposal, and there is no evidence that, having obtained the landowner's agreement to lease his property for the erection of a broadcast tower, Croom lacked reasonable assurance for the January 8th site when he filed that amendment.[5] Nor is there a question as to the validity of Croom's original coverage proposal that would have prevented him from returning to his initial, lesser coverage proposal.[6] Thus, the need for a further site was not foreseeable, and Croom could amend to a new site, provided he could demonstrate good cause from the date that he learned of the existence of the restrictive covenants.

8. While not impugning Croom's motives in filing the January 8th amendment, Nugget nevertheless urges that it would be unfair to grant Croom's application over competitors who, unlike Croom, did not attempt to improve their comparative position with a last-minute, ill-conceived coverage proposal. The restrictive covenants are, as Nugget alleges, a matter of public record that could have been discovered in a routine title search. But there is no evidence that Croom had actual notice of their existence when he filed the January 8th amendment or that he otherwise acted in bad faith.[7] Croom did not, in our view, act unreasonably in specifying the site based upon his lease agreement with the property owner without seeking independent confirmation of its availability for use as a transmitter site. In this regard, Croom was not proposing to buy, but to lease, land located outside the boundaries of any municipality and not otherwise restrictively zoned. Given the property owner's commitment to lease, he therefore had no clear reason to undertake a title search of that property. That such land would be subject to restrictive

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[4] This case is clearly distinguishable from situations in which a zoning change or official permission is necessary to secure the site for broadcast use, inasmuch as there was no impediment -- such as the need for a zoning variance or the refusal of a governmental entity to give any assurance unless the applicant enters into a legally binding contract -- preventing Croom from resolving the questions raised by the existence of the restrictive covenants. Under those situations, a site issue is warranted only if there is a reasonable showing that the applicant will be unable to obtain authorization for the proposed construction. See, e.g., *Warren Price Communications*, 7 FCC Rcd 4344, 4345 ¶ 7 (1992), citing *Kenter Broadcasting Co.*, 62 RR 2d 1573, 1578 (1986); and *Alden Communications Corp.*, 3 FCC Rcd 3937 (1988).

[5] We note that Croom proposed to operate with 6 kW of power at the January 8th and June 11th sites but proposed only 3 kW of power at his original site, and that he proposed to utilize a tower with a radiation center 100 meters above average terrain at the January 8th and June 11th sites but a tower with a radiation center only 51 meters above average terrain at the original site. While the additional coverage at the current site may be attributable in some degree to these technical changes, the record does not establish whether Croom could have erected a tower with these technical specifications at his original site, which is the only site for which reasonable assurance had not been vitiated as of the deadline for amendments as a matter of right. Under these circumstances, permitting Croom to claim any additional coverage would constitute a post-deadline upgrading to the prejudice of the other applicants.

[6] See, e.g., *Aspen FM*, 6 FCC Rcd 1602, 1603-04 ¶ 13 & n.6 (1991), in which reasonable assurance for financing at the time of certification was held to be a critical ingredient in a good cause showing for a subsequent financial amendment.

[7] The record reflects that Croom obtained a verbal agreement from Milton Howard on January 5, 1990 and that it was only after he filed the January 8th site amendment that Howard mentioned the possibility that the land was subject to restrictive covenants that might affect its use for a broadcast tower. Croom testified (Tr. at 87-88) that Howard advised him of the existence, but not the precise nature, of the restrictive covenants.

covenants necessitating a further site amendment was not so clearly foreseeable as to require the rejection of the June 11th amendment for lack of good cause.[8]

9. Nor did Croom proceed in such a dilatory manner after discovering the existence of the covenants as to warrant the outright dismissal of his application for lack of a transmitter site. Although unaware of the precise nature of the covenants, Croom filed an amendment on January 9, 1990, reporting that the site was subject to restrictive covenants that "may or may not render it suitable" for his purpose, and that he would immediately seek to determine the facts concerning the site. Upon investigating this matter, Croom learned that the covenants restricted the property to residential use, which could jeopardize its use as a transmitter site for a broadcast tower in the absence of an agreement from adjacent landowners not to enforce the covenants.

10. Rather than pursuing potentially time-consuming negotiations, however, Croom advised the Commission on February 10, 1990 that the site was unsuitable, that he had located another site, that he was close to an agreement with the landowner, and that he would prepare and file a technical amendment as soon as he received the landowner's official response, which was anticipated by March 1, 1990.[9] On March 20, 1990, Croom received oral confirmation from Mr. O. Lee Williams, the Dawsonville District Supervisor for Inland-Rome, Inc., that the property in question would be made available to Croom for the erection of a broadcast tower. Although the company's written authorization was dated February 22, 1990, Williams did not receive it until March 19, 1990. After talking to Williams, Croom immediately directed his consulting engineer to prepare promptly an amendment for filing with the Commission. By letter, dated March 20, 1990 Croom advised the Commission of these developments. In a subsequent letter, dated May 4, 1990, Croom advised the Commission that completion of the amendment had been delayed due to illness in the engineer's family. The site amendment was filed on June 11, 1990.

11. Under these circumstances, we are satisfied that, upon learning of the restrictive covenants, Croom exercised due diligence in locating and amending to his current site.[10] Thus, we find that Croom's June 11, 1990 site amendment is supported by good cause,[11] that the filing of the amendment more than 30 days after the discovery of the restrictive covenants is not fatal, and that the dismissal of Croom's application for lack of a transmitter site is therefore not warranted.

12. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g) of the Commission's Rules, the Application for Review filed on April 2, 1993, by Nugget Broadcasting Company, the application for review filed on April 5, 1993, by Georgia Mountains Communications,[12] and the Contingent Application for Review filed on April 5, 1993, by Kevin C. Croom ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[8] See, e.g., *Marin TV Services v. FCC*, 936 F.2d 1304, 1307 (D.C. Cir. 1991), the fact that certain individuals had questioned suitability of the original site did not make the need to specify a new site foreseeable, and due diligence is therefore measured from the specification of a site issue in the *Hearing Designation Order*.

[9] The February 10th amendment further indicated that "local approval by the district supervisor of the landowner has been secured, who has advised the applicant that he will recommend to his superiors that the property be made available to the applicant."

[10] We have faulted applicants for pursuing courses of action that they knew, or should have known, would be ineffective rather than promptly amending to a new site. See, *Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5193-94 ¶ ¶ 21-22 (1991). Whatever the likelihood of Croom securing an agreement from the adjacent property owners permitting the erection of the tower, his expeditious decision to seek an alternative site demonstrates due diligence. See, *Harrison County Broadcasting Co.*, 6 FCC Rcd 5819 (Rev. Bd. 1991), review denied, 7 FCC Rcd 2993 (1992).

[11] In finding that the June 11th amendment was supported by good cause, we recognize that Croom specified the current site more than thirty days after the landowner mentioned the restrictive covenants to Croom, in conflict with our admonition in *Imagists*, 8 FCC Rcd 2763, 2765 ¶ 14 (1993), urging "applicants, whenever possible, to submit curative amendments no more than 30 days after they learn, or should have learned" of the need for an amendment. In contrast to *Imagists*, rejecting for lack of good cause under 47 C.F.R. § 73.3522(b) a post-designation site amendment filed more than 15 months after the applicant learned of a short-spacing problem, however, this is not a case in which "an applicant [sat] idly by, either doing nothing or pursuing a course that [was] unlikely to resolve the problem expeditiously." *Id.* at ¶ 12 & nn. 12-13. Moreover, this case involves somewhat different considerations from *Imagists*. There, the concern was the delays to our adjudicatory proceedings caused by hastily conceived proposals and multiple proposals from a single applicant. We emphasized that, even when submitted early in the proceeding, such amendments may nevertheless contravene the applicants' interest in the expeditious resolution of the proceeding. Here, as noted above, the January 8, 1990 amendment was submitted not to cure a deficiency in the original coverage proposal but to enhance that proposal, and the pre-designation amendments did not delay the commencement of discovery or otherwise prolong the adjudicatory process. Thus, our primary concern here is avoiding prejudice to the competing applicants due to Croom's multiple coverage amendments, and that concern has been obviated by the decision holding Croom to his original site proposal for comparative purposes.

[12] By Order, FCC 93I-024 (released April 21, 1993), the General Counsel, acting under delegated authority, indicated that the Commission had no record of Georgia Mountains Communications' Application for Review. In response, GMC has submitted a copy bearing an original ink stamp from the FCC Mail Room, as well as a statement under penalty of perjury, dated April 27, 1993, from Paula Puckett describing the circumstances surrounding the filing on April 5, 1993 of Georgia Mountains Communications' Application for Review and additional material furnished by Federal Express. This satisfies us that GMC's Application for Review was timely filed, a copy of that pleading has been placed in the Docket record for this proceeding, and it has been fully considered. For completeness, the letters and attached material that Paula Puckett sent to the General Counsel on April 27, and May 8, 1993, in response to the April 21, 1993 Order, which were not filed with the Secretary's Office, have also been placed in the Docket record.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-277

In re Applications of

GLORIA BELL BYRD	File No. BPH-880912MC
ORMOND BROADCASTING, INC.	File No. BPH-880915MI
deHARO RADIO LTD., A FLORIDA LIMITED PARTNERSHIP	File No. BPH-880915MJ
B H BROADCASTING, INC.	File No. BPH-880915MQ
McFAYDEN BROADCASTING LIMITED PARTNERSHIP	File No. BPH-880915MR
GREENE COMMUNICATIONS, LTD.	File No. BPH-880915MW

For Construction Permit for New
FM Station, Channel 239A
Ormond-By-The-Sea, Florida

MEMORANDUM OPINION AND ORDER

Adopted: September 23, 1993; Released: October 1, 1993

By the Commission:

1. We have before us applications for review of the Review Board's decision in this case, 7 FCC Rcd 7976 (1992), filed on January 11, 1993 by Gloria Bell Byrd, Ormond Broadcasting, Inc., deHaro Radio, Ltd., B H Broadcasting, Inc., McFayden Broadcasting Limited Partnership, and Greene Communications, Ltd.[1] We have decided after duly considering these appeals to affirm the Review Board's ultimate holding that it would best serve the public interest to grant the application of Gloria Bell Byrd in preference to the competing applications of the other appellants. In the body of this opinion we address arguments presented in the appeals that merit comment.

Greene's Integration Plan

2. Greene Communications, Ltd. ("Greene") claims full quantitative integration credit on the basis of representations that its general partner, Elaine W. Greene, would work full-time at the proposed station as its general manager. Mrs. Greene is the president and 75 percent owner of Sable Communications of Georgia, a firm that she founded in 1982 which develops and markets video advertising for display via cable television. *Initial Decision*, 7 FCC Rcd 2861, 2867 ¶90. She testified that she had actively participated in the management of Sable from its inception until the end of 1988 but that her involvement in it since then has been "substantially" reduced. She promised that if Greene's application were to be granted she would curtail all activities on Sable's behalf "to the extent necessary to work full-time at the proposed station, including resignation as President, should that become necessary." 7 FCC Rcd at 7982 ¶19.

3. Mrs. Greene and her husband own a house in the vicinity of Atlanta which is their principal place of residence. 7 FCC Rcd 2867 ¶89. She alleged that they reside 25 percent of the time, however, in a condominium in a suburb of Daytona Beach, within the predicted 3.16 mV/m contour of the proposed station, and that they would live there full-time should the Commission grant Greene's application. Tr. at 1092; 7 FCC Rcd at 2867 ¶89. They did not own any real property in the Daytona Beach area or reside there, either full- or part-time, until shortly before the filing of Greene's application. *Id.*

4. The Review Board rejected Greene's claim of integration credit for want of adequate assurance in the record that its general partner would carry out her professed intention to devote herself to full-time, on-site supervision of the proposed station. The Board anchored its analysis by invoking precedents indicating that, in order to receive credit for the integration of principals with business interests that they do not propose to divest, applicants must provide a detailed accounting of the functions that they currently perform in furtherance of those enterprises as well as the time that they currently devote to them and that they must present a specific credible plan for accomodating the existing interests with their integration plans. See, *e.g.*, *Radio Naguabo Broadcasting Co.*, 6 FCC Rcd 4879, 4880 (1991), and *Blancett Broadcasting Co.*, 17 FCC 2d 227, 230 (Rev. Bd. 1969). The Board found Greene's showing deficient by this standard because it had not presented a detailed account of Mrs. Greene's current functions and time spent on Sable's behalf or a specific accommodation plan. 7 FCC Rcd at 7982 ¶19. Further, the Board indicated that Mrs. Greene's professed willingness to disengage from active involvement with Sable was belied by the absence of an unequivocal pledge to resign from its presidency and by statements in her testimony about its success. 7 FCC Rcd at 7982 n.46.

5. Greene asserts in its application for review that, contrary to what the Board purported to find, there is no record evidence that controverts Mrs. Greene's testimony that she would curtail active involvement with Sable and resign from her position as president if necessary in order to keep her integration commitment. Furthermore, it pro-

[1] Byrd, Ormond Broadcasting, Inc., McFayden Broadcasting Limited Partnership, and Greene Communications, Ltd. filed oppositions on January 26.

tests that the Board ignored her uncontradicted testimony that she had already reduced her involvement with Sable to a substantial extent.

6. These objections are unavailing. Whether or not there is evidence that contradicts it, Mrs. Greene's testimony about her intentions and her testimony that she has already "substantially" reduced her involvement in Sable are not enough to satisfy Greene's burden of proof. Greene has not disclosed the nature of the functions that its general partner still performs for Sable, the amount of time she devotes to those functions, or who she would entrust with those functions in the event of her withdrawal from active involvement in the firm's affairs.[2] In view of the silence of the record as to these matters, we agree with the Board that Greene has not presented a "specific credible plan" as called for in *Naguabo*. Compare *Lowery Communications, L.P.*, 8 FCC Rcd _____ ¶ 8 (1993), with *Ronald Sorenson*, 6 FCC Rcd 6901, 6902 ¶ 8 (1991).

7. Greene also contends that the Board's rejection of its integration claim is inconsistent with *Kevin Potter*, 7 FCC Rcd 4342 (1992), where the Commission found adequate assurance that a principal would carry out an integration pledge despite the fact that he planned to keep two existing broadcast stations that he owned and was currently managing, inasmuch as he had pledged to reside full-time with his family in the proposed station's community of license, which was several hundred miles distant from the existing stations. Greene points out that its own principal has pledged to commence full-time residence with her husband in their condominium in the service area of the proposed station, which assertedly lies some 450 miles from their present residence near Atlanta.

8. Greene's reliance on *Potter* is misplaced. The principal who proposed in *Potter* to keep his proprietary interest in two existing broadcast stations testified that he planned to delegate daily management of the stations to employees, 7 FCC Rcd at 4342 ¶ 6, whereas Mrs. Greene has provided no information at all about measures that would be taken to enable her to shift her attention from managing Sable to supervising operation of the proposed station in Ormond-By-The-Sea. The plan to change place of residence that was held to be a crucial factor in *Potter* would have been immaterial, moreover, but for the fact that the retained businesses were, by nature, inseverable from their current geographic location. By virtue of this agency's regulations the plant of Kevin Potter's two existing broadcast stations had to be situated in the vicinity of Monmouth, Illinois, their essential day-to-day operations had to be carried out there, and the service that they provided was likewise confined to that vicinity. Potter's willingness to move from Monmouth to the site of the proposed station, far beyond feasible daily commuting distance from Monmouth, lent additional plausibility to his pledge to devote his attention primarily to the new station. Here, on the other hand, it is not apparent from the pertinent findings, 7 FCC Rcd at 2867 ¶90, from any cited evidence of record, or from any obvious circumstances that any legal or commercial exigency militates against shifting the locale of Mrs. Greene's regional video marketing business or her present functions in connection with it from Atlanta to a site in the vicinity of Ormond-By-The-Sea.[3] Because Greene bears the burden of proof as to its claims of comparative credit and because it has made no meaningful showing concerning Mrs. Greene's current and future involvement with her video marketing business, we agree with the Review Board that Greene has not reliably established that its integration proposal will be carried out as proposed.

9. Finally, Greene argues that the Commission should relax the burden of proof for applicants claiming credit for integration of principals with potentially conflicting interests, in light of its recent adoption of a rule, 47 C.F.R. §73.1620(g), requiring new station owners to report deviations from their integration plans one year after having applied for a covering license. We decline to adopt this proposal. Although the new rule was designed to deter applicants from attempting to gain credit with spurious integration proposals, its adoption supplements, rather than obviates, the policy of requiring applicants to meet a burden of persuasion as to likelihood of effectuation in order to receive integration credit in comparative proceedings. See *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 171 n.20 (1991).

McFayden's Integration Plan

10. McFayden Broadcasting is a limited partnership with two owners. Dawn F. McFayden, the general partner, has a 20 percent equity share, and Carl J. Tutera, Jr., the limited partner, has the remainder. 7 FCC Rcd at 7976 ¶ 2. Ms. McFayden, who is a member of a minority group and has lived in the area bounded by the proposed station's predicted city-grade contour for 28 years, proposes to serve as the station's full-time general manager. *Id.* McFayden asserted that Tutera, on the other hand, who is not a member of a recognized minority group, is a purely passive investor who would take no part in station management or operation. (McFayden Broadcasting Exh. 1). The ALJ held that McFayden is entitled to full quantitative integration credit and that it is better-qualified than any competing applicant with full quantitative credit by virtue of its enhancements for minority ownership and long-term local residence. *Id.*

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[2] Mrs. Greene testified that she had established the company in 1982 and that from then until the end of 1988 she had performed the following functions for Sable Communications: "supervision and oversight of all accounting activities, hiring and firing of sales, technical and office personnel, . . . approval and disapproval of programming material for insertions [sic] into cable television time-slots", and "[making] arrangements for public interest notices and . . . public relations appearances". Although she alleged that she had reduced her involvement after 1988, she did not explain how or to what extent.

[3] According to Mrs. Greene's written testimony, Sable Communications of Georgia "is engaged in the business of developing and marketing video advertising for insertion into commercial time-slots on cable television systems located in several major Eastern and Southeastern markets." She did not elaborate upon this description at the hearing. Mrs. Greene asserted that Sable's "sphere of conduct takes place in Georgia," for the most part, Tr. at 1082, but she revealed under cross examination that *her principal place of residence throughout the period between 1982 and 1988 when she was most actively involved in managing Sable was in West Palm Beach, Florida*, Tr. at 1092-93, which is much farther from Georgia than Ormond-By-The-Sea.

11. The Review Board, in contrast, rejected McFayden's claim of integration credit, as it found no credible assurance that Ms. McFayden is and will be its sole *controlling* owner, that she would directly supervise the proposed station's daily operation, and that Tutera would not be actively involved in the firm's affairs. *Id.* at 7979-80 ¶ ¶ 12-14.

12. One proven circumstance that the Board considered as weighing against McFayden's integration claim is that Tutera's signature (as well as Ms. McFayden's) appears on the bank signature card for the partnership's checking account. *Id.* at 7979 ¶12. McFayden asserts that the Board ignored explanatory testimony that establishes that this circumstance is immaterial. It cites testimony by Ms. McFayden that when she went to the bank in 1988 to open the account a bank officer told her that her limited partner would also have to present himself because bank policy so required; that she informed the bank later that Tutera did not have authority to write checks on the account and therefore prompted it to make a substitute card bearing only her own signature; and that she keeps the checkbook and is the only one who has ever drawn checks on the account.

13. We agree with the Board, however, that Tutera's endorsement of the signature card materially undermines the reliability of McFayden's integration proposal. The fact that he signed the card with his partner's knowledge and consent, thereby indicating to the bank that he had authority to draw checks on the account without her endorsement,[4] is prima facie proof that they intended for him to have this prerogative and contemplated his exercising it under some possible contingency, which is inconsistent with the representation that Tutera was merely a passive investor. (Actually, Tutera signed *two* signature cards for the account on separate occasions, for reasons that are not apparent. Tr. at 375-76.) Contrary to suggestions in McFayden's applications for review, Ms. McFayden's cryptic testimony that the bank officer told her that Tutera's presence was required because of bank policy, Tr. at 372, does not negate the reasonable inference that her partner signed the card because they intended that he have the privilege of drawing checks on the firm's account. She did not expressly testify that the bank officer told her that bank policy required Tutera to *sign* the card, let alone that it required this even if neither partner wanted him to have the privilege of writing checks on the account, nor did she clearly imply as much by merely asserting that she had summoned Tutera because of something the officer had told her about bank policy. In fact, the bank did not have any policy that effectively required Tutera to sign the card in order for Ms. McFayden to be able to draw checks on the account, as it readily complied with her later request to make out a new card without his signature. Tr. at 380. There is no record evidence as to precisely what the bank officer told Ms. McFayden about bank policy,[5] and McFayden, which bears the pertinent burden of proof, is not entitled to the benefit of any speculation about material questions of fact in this regard concerning which the record is silent. In stressing that its general partner eventually directed the bank to replace the card with one bearing only her own signature, McFayden neglects to note that she did not do so until some two years after opening the account and only after having been examined by adversary counsel at a pre-hearing deposition session. Tr. at 380-81. In light of its timing, this action merely establishes that on the eve of the hearing in this case, when she was evidently alert to the danger that her adversaries might produce the signature card reflecting an instruction to honor drafts on the firm's account by its limited partner as evidence to discredit McFayden's integration proposal, Ms. McFayden thought it prudent to have the bank replace the card with one that comported better with the proposal; this tactically-expedient action affords little insight as to her or Tutera's true intentions.[6]

14. McFayden argues that the Board also erred in attributing material significance to the admitted fact that Tutera's home address is entered on an application filed with the State of Florida in 1990 for a certificate of registration to do business there. 7 FCC Rcd at 7977 ¶ 4, 7979 ¶12. McFayden asserts that "the mere listing of a mailing address for a limited partner does not constitute improper activity." This conveniently obscures the fact that the address was not merely listed as the personal address of the limited partner but was entered as the mailing address of the partnership itself. Greene Exh. 2. McFayden points out that its general partner's address also appears on the form, but we note that this is only listed as her personal address. The absence of testimony that Tutera knew that his address had thus been registered with the state as the firm's mailing address, which McFayden stresses, is of no crucial importance. The designation of the limited partner's personal address on the application form as the firm's mailing address speaks for itself, and what it tells us is that one or both of McFayden's partners preferred that correspondence to the firm from the state government would be sent to Tutera rather than to Ms. McFayden. That evident intention does not square with McFayden's representations that Tutera will have nothing to do with the management of its affairs.

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[4] As the Board noted, 7 FCC Rcd at 7979 n.30, "one" was typed on the card following a pre-printed prompt, "number of signatures required."

[5] Perhaps what he told her was that bank policy required that Tutera sign the card before it would honor checks signed by him without her co-endorsement -- which would have been correct advice. We do not infer that this is what he told her, but neither would it be fair to infer from the record that he gave her to understand that Tutera would have to sign the card before the bank would honor checks signed by her, as McFayden implies. Had the bank officer mistakenly informed her that the bank had such a peculiar policy, Ms. McFayden had a compelling incentive to make that plain in her testimony, as it was obviously in her interest to establish that Tutera's motive for signing the card was something other than a desire to secure the privilege of check-writing.

[6] The ALJ's finding that Ms. McFayden never intended to permit her limited partner to draw checks on the firm's account, 7 FCC Rcd at 2865 ¶63, is unsupported. When a cross-examiner asked her whether she and Tutera had had some understanding as to whether he had the prerogative of writing checks, Ms. McFayden merely replied that they *currently* had an understanding that he did not have that right. Tr. at 396. Her present-tense statement to that effect at the hearing, which is confirmed by proof that she had rescinded permission for the bank to honor checks by Tutera several weeks before the hearing began, does not support an inference that it had never been her intention to let him write checks on the account.

15. Among other relevant matters that it mentioned as grounds for concluding that McFayden's integration claim is not sustained by the record as a whole, the Board observed that

> we are faced with the now banal tableau of a cohort of broadcast entrepreneurs [*viz.*, Tutera and his father] recruiting, for a token payment made solely at the suggestion of counsel '[t]o show some sort of commitment to it,' a random neophyte and ceding away a 20% equity share along with purportedly *exclusive* control. This is unreal . . . . And . . . the sole alleged 'general' partner claimed her liability for the applicant was 'limited' to her $1,000 contribution, an inversion of the ordinary limited partnership *regula*.

(original emphasis) (footnotes omitted) 7 FCC Rcd at 7979-80, ¶13. McFayden objects that the Board has disparaged it for conforming to a pattern that "comports with" the Commission's minority ownership policy. In particular, it contends that by attributing adverse significance to the small size of the general partner's financial contribution the Board undermines the primary reasoning behind the policy, as the dearth of minority ownership is assertedly due in large part to a shortage of financial resources among potential minority applicants.

16. This argument is to no avail here. The amount of the general partner's contribution was just one factor among many that the Board considered as bearing upon the reliability of McFayden's integration proposal, and its decision does not imply that two-tiered applicants must necessarily show that minority owners have contributed amounts of financial capital proportionate to their equity shares in order to receive full quantitative integration credit with minority-ownership enhancement. The minority ownership policy, as well as other important public-interest policies affecting the comparative process, would be disserved by awarding credit for ostensible plans for integration of minority owners without regard to the reliability of the plans. The amount of a general partner's capital contribution is one of a number of factors bearing on the reliability of a representation that he would control the firm and manage the proposed station without assistance or interference from other owners. Therefore, it was proper to consider that factor in this instance. See, *e.g.*, *KIST Corp.*, 102 FCC 2d 288, 292 ¶ 8 and n.11 (1986).

17. While we agree with the Board that a preponderance of the relevant evidence militates against granting McFayden full quantitative integration credit, some corrections and additions are in order. First, contrary to the Board's finding in ¶13, Ms. McFayden did not testify at Tr. 394 that she was unfamiliar with various sections of the application; rather, she said that she did not know what Section 310(a) of the Communications Act requires and could not recall whether she knew so when McFayden's application was being prepared, although she had signed the application to certify its accuracy and the application represented that it could be granted consistently with that provision. She alleged that she had prepared some portions of the application herself and had reviewed the other portions, which McFayden's attorney and engineering consultant had prepared. Tr. at 391-95. It is not clear from the record, however, that she exercised any independent judgment in this regard, as opposed to performing the merely clerical function of filling in easily-ascertainable facts. Second, with the exception of item (8) and the assertion that Tutera was active in locating a transmitter site, the factual contentions enumerated in ¶ 4 of the Board's opinion that the Board does not expressly adopt are correct. Moreover, not only did Ms. McFayden hire the engineering consultant that Tutera recommended, 7 FCC Rcd at 7977 ¶ 4, she did so without even knowing what reasons Tutera had for recommending him, Tr. at 358, which is a further indication that McFayden's general partner has not exercised independent judgment on the firm's behalf.

18. In sum, McFayden has not reliably demonstrated on the record that its integration proposal will be effectuated as proposed. We therefore affirm the denial of its claim of integration credit. See *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 ¶10 (1990).

OBI's Integration Plan

19. The ALJ awarded OBI 100 percent quantitative integration credit with 100 percent enhancement for minority ownership, a "very slight" enhancement for its integrated principal's proposal to move to the community of license, and another very slight enhancement for proposing auxiliary power. 7 FCC Rcd at 2868 ¶98. He awarded Byrd 100 percent quantitative integration credit with 100 percent enhancement for 34 years of past local residence and participation in civic affairs, a very slight enhancement for proposing auxiliary power, and a "slight" preference, as against OBI, for greater proposed population coverage. *Id.* at 2868 ¶ ¶ 96-97 and 2870 ¶116. On the basis of these findings, he concluded that these two applicants were "approximately equal" in comparative rank. He did not find it necessary to undertake a closer comparison between them, as in his estimation both were clearly inferior to McFayden. *Id.* at 2870 ¶118.

20. The Review Board held, however, that Byrd is comparatively superior to OBI. The only rationale that it gave for the holding was to note that OBI's active principal had no past local residence or local civic activities; it did not acknowledge the countervailing consideration that OBI had been credited with an enhancement for minority ownership. 7 FCC Rcd at 7984 ¶28.

21. OBI contends that it must be ranked above Byrd in comparative assessment. It maintains that its credit for minority ownership is equal in weight to Byrd's combined credit for local residence and civic activities, citing *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 (1985), and that its active principal's pledge to move to Ormond-By-the-Sea tips the scales in its favor.

22. We do not agree with OBI that its active principal's mere proposal to move to the license community tips the final balance in its favor. We have generally anticipated that integrated principals will live in the vicinity of the license community, as remote residence would normally be incompatible with the daily presence that integration entails. Future local residence, as the Commission said in the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965), is *expected* to accompany meaningful participation. Hence, little or no credit beyond the basic "quantitative" credit given for proposing the full-time integration of a principal is to be awarded merely on the strength of representations that he intends to commence local residence in the event his application is granted. A contingent and self-serving proposal of future local residence is a less reliable indicator of genuine intention to live in a given locality, moreover, than prolonged past residence there continuing to the present. Further, unlike

past local residence combined with a record of civic participation, it affords no evidence of pre-existent familiarity with and concern for the needs of the community to be served. We therefore hold that any credit due on account of the contingent proposal of OBI's active principal to commence future residence in Ormond-By-The-Sea is of minimal significance and that Byrd has a substantial advantage under the overall local residence/civic involvement criterion, which, in combination with its undisputed coverage preference, outweighs OBI's substantial advantage for minority ownership. Thus, Byrd prevails in the overall comparison.

Conclusion

23. Byrd, with full quantitative integration credit and no diversification demerit, is superior in comparative merit to deHaro, which claims no integration credit, and to Greene and McFayden, whose claims for full quantitative integration credit have been rejected. Byrd also has an edge over OBI, as just explained. Byrd outranks B H, too, even assuming that B H deserves full quantitative credit for integration (which is a matter of dispute), as B H's claimed enhancements for a promise to relocate to Ormond-by-the-Sea and broadcast experience are of less moment than Byrd's enhancement for long-term local residence and civic participation. 7 FCC Rcd at 2868 ¶97, 2869 ¶105; 7 FCC Rcd at 7984 ¶28. We therefore agree with the Board's ultimate conclusion that Byrd's application should be granted in preference to the other applications at issue.

24. ACCORDINGLY, IT IS ORDERED that the applications for review filed on January 11, 1993 by Gloria Bell Byrd, B H Broadcasting, Inc., deHaro Radio, Ltd., Ormond Broadcasting, Inc., Greene Communications, Ltd., and McFayden Broadcasting Limited Partnership ARE DENIED and that the application of Gloria Bell Byrd, File No. BPH-880912MC, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Bell Atlantic Telephone Companies, Bell Atlantic Mobile Systems, Inc., NYNEX Corporation, and Southwestern Bell Corporation Petition for Investigation and Order to Show Cause Regarding Proposed Transaction Between McCaw Cellular Communications, Inc., and American Telegraph Company

File No. MSD 93-13

ORDER

Adopted: September 23, 1993; Released: September 30, 1993

By the Chief, Mobile Services Division:

1. On January 27, 1993 the Bell Atlantic Telephone Companies, Bell Atlantic Mobile Systems, Inc., NYNEX Corporation, and Southwestern Bell Corporation (collectively, the Petitioners) filed a "Petition for Investigation and Order to Show Cause" regarding an announced intention of American Telephone & Telegraph (AT&T) to acquire a stock interest in McCaw Cellular Communications, Inc. (McCaw). The Petitioners' request was in response to the November 4, 1992 announcement by AT&T and McCaw that they were engaged in negotiations to agreements that would result in AT&T acquiring approximately 33 percent ownership interest in McCaw, as well as an option for AT&T to acquire voting control of McCaw.[1] The Petitioners requested that the Commission investigate the competitive consequences of the proposed AT&T-McCaw transaction pursuant to Section 1.1 of the Commission's Rules, 47 C.F.R. § 1.1, to determine if the stock purchase would serve the public interest. The Petitioners also requested that the Commission issue an order to show cause why the stock purchase would not constitute a transfer of control, requiring prior Commission approval under Section 310(d) of the Communications Act of 1934 (the Act), 47 U.S.C. § 310(d).

2. On August 23, 1993, AT&T and McCaw filed applications for the transfer of control of McCaw to AT&T. These applications have been preliminarily reviewed and found to be acceptable for filing. Consequently, the Commission, on September 15, 1993, issued a public notice, inviting interested parties pursuant to Section 309 of the Act, 47 U.S.C. § 309, to file & comments and raise public interest concerns with regard to the proposed acquisition of control of McCaw by AT&T.[2]

3. We find that the proposal to transfer control of McCaw to AT&T has rendered the Petitioners' request for show cause moot. Furthermore, any concerns regarding the competitive consequences of the proposed transfer of control will be addressed in the context of the transfer of control proceeding. The Petitioners as well as other commenters may want to redirect their concerns to the Commission in accordance with the procedures specified in the public notice.

4. Accordingly, IT IS ORDERED THAT the "Petition for Investigation and Order to Show Cause" filed by the Bell Atlantic Telephone Companies, Bell Atlantic Mobile Systems, Inc., NYNEX Corporation, and Southwestern Bell Corporation IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

[1] *See New York Times*, Nov. 4, 1992, at D1; *Wall Street Journal*, Nov. 6, 1992, at B1.
[2] FCC Public Notice, Rpt. No. DA 93-1119 (Sept. 15, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-24

In the Matter of
Local Exchange Carrier Line
Information Database

ORDER

Adopted: August 16, 1993; Released: August 23, 1993

By the Commission:

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I. INTRODUCTION AND BACKGROUND

1. This Order resolves the issues designated for investigation by the Common Carrier Bureau (Bureau) arising from several local exchange carriers' (LECs') offerings of line information database (LIDB) service.[1] The affected carriers, Ameritech, Bell Atlantic, BellSouth, GTE, NYNEX, Pacific, SNET, Southwestern, United, and US West, filed tariffs to establish charges for transmission services connecting customers to the carriers' common channel signalling networks (CCS) and for access to the data in their LIDBs.[2] In the *LEC LIDB Order*[3] and the *SNET LIDB Order*,[4] the Bureau suspended the transmittals for one day, imposed accounting orders, and initiated investigations of the tariff transmittals referenced above.

2. A LIDB is a database created by an individual LEC. LIDB service enables customers such as interexchange carriers (IXCs) to query the database to determine whether a LEC joint use calling card is valid for use, or whether a particular telephone number can accept collect or third-party billed calls, before transmitting any call using that card or line number. Each database can be accessed by other LECs, IXCs and other customers to obtain data on the account status of LEC joint use calling cards, as well as information on line numbers, such as third party billing or collect call restrictions. This information is stored in the LIDB and updated by the LEC on a regular basis.

3. Carriers recover the costs of LIDB service through four separate charges. The first charge recovers the costs of the service control point (SCP) which is the database itself. The second charge recovers the cost of the SCP port, the transmission lines between the SCP and the signal transfer point (STP),[5] and the port in the STP in which the transmission line terminates. Two other charges recover the cost of the transport facilities from the IXC's point of presence in its network to the LEC's STP. The first of these is a per port charge for the port on the signalling network side of the STP. This port is the place where the transport facility between the IXC's signalling point of interface (SPOI)[6] and the LEC's signalling network terminates. The second subelement is a charge per line which recovers the costs of the transport facility itself.[7] A diagram of the LIDB rate structure is contained in Appendix B.[8]

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[1] Local Exchange Carrier Line Information Database, CC Docket No. 92-24, 7 FCC Rcd 2169 (Com. Car. Bur. 1992) (*Designation Order*).

[2] The list of filing carriers and participating parties, together with the acronyms and abbreviations we use to refer to them in this Order, appears as Appendix A.

[3] Local Exchange Carrier Line Information Database, 7 FCC Rcd 525 (Com. Car. Bur. 1991) (*LEC LIDB Order*), *review denied*, 8 FCC Rcd 2957 (1993).

[4] Southern New England Telephone Company, CC Docket No. 92-24, 7 FCC Rcd 1474 (Com. Car. Bur. 1992) (*SNET LIDB Order*).

[5] STPs are packet switches that provide CCS message routing and transport.

[6] The SPOI is the point at which the LEC's and IXC's CCS networks meet.

[7] *See* Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Report and Order, CC Docket No. 91-115, 7 FCC Rcd 3528 (1992) (*LEC Calling Card Order*), *recon. pending. See also*, Southwestern Bell Telephone Company, Petitions for Waiver of Part 69 of the Commission's Rules, DA 91-1258, 6 FCC Rcd 6095 (Com. Car. Bur. 1991) (*Southwestern Bell LIDB Order*), *recon. dismissed*, 7 FCC Rcd 5566 (Com. Car. Bur. 1992), *review denied*, 7 FCC Rcd 6539 (1992).

[8] This diagram is not intended to reflect the actual physical network design, but is provided to assist in understanding the rate structure.

4. In the *Designation Order*, the Bureau sought comment on the following issues: (1) have the LECs adequately described the LIDB query service in the tariffs; (2) should the tariffs contain additional detail regarding the technical parameters for transport from the IXC network to the LEC network; and (3) are the rate levels established in the tariffs excessive.[9] In this Order we find that the rate levels in the tariffs of eight of the LECs are excessive, that the LECs have not adequately described the LIDB query service, and that the tariffs require additional detail regarding the technical parameters for the transport link.[10]

II. DISCUSSION

A. Are the rate levels established in the tariffs excessive?

5. In the *Designation Order*, the Bureau asked the LIDB providers to supply cost information to assist in evaluating whether the rate levels established in the tariffs are excessive.[11] Subsequently, the Bureau served a data request on the LEC LIDB providers, seeking additional detail not contained in the LEC direct cases. The LEC LIDB providers have also submitted *ex parte* filings, many of which propose rate reductions.[12]

1. Pleadings

6. Companies have set their rates by first determining the direct per unit investment required. They then develop direct unit costs by applying loading factors to this investment and by identifying additional costs (such as software right to use fees) specific to LIDB. All of the companies maintained in their direct cases that the rates, which range from $0.03 to $0.045, established in this manner are reasonable.[13] Nevertheless, several of the companies have identified in *ex parte* filings reductions in their levels of direct costs and overheads assigned to LIDB rate elements.[14]

7. Several companies have stated in their direct cases that they used the Common Channel Signalling Cost Information System (CCSCIS), a proprietary cost model developed by Bellcore, to develop their unit investments for the LIDB rate elements.[15] In support of the use of this model, companies noted that the equipment used to provide LIDB service would be used for several services, and that therefore some allocation of this equipment was required. Because CCSCIS is an engineering-based model, the companies argued, it is ideal for this purpose.[16]

8. Allnet, CompTel, ITI, MCI and Sprint contend that the rates of all of the LIDB providers are excessive.[17] Allnet, MCI and Sprint are particularly concerned about the reliance placed by the companies on the CCSCIS cost model for the development of their rates. These commenters complain that none of the LIDB providers using this computer cost model give a meaningful, detailed explanation as to how CCSCIS works.[18]

2. Discussion

9. The LIDB service investigated in this proceeding is a new service for price cap purposes, *i.e.*, LIDB is an optional service that adds to a customer's range of choices. Under the Commission's new services test, companies must identify the direct cost of providing the new service and then must add an appropriate level of overheads to derive the overall price of the new service. In adopting this standard, the Commission stated that price cap LECs should have some flexibility in establishing overheads for new services, in order to establish strong incentives to provide new services.[19]

10. Our analysis of the reasonableness of the companies' LIDB rates was a three step process. First, we examined the companies' direct investment to determine if the investment assigned to each of the four rate elements for LIDB service by the companies was reasonable. Second, we examined the amount of direct cost[20] assigned to each rate element to determine if the direct costs fell within a reasonable range, as compared to the level of the direct investment. Third, we evaluated whether the claimed overhead expenses were reasonable, as compared to the level of the direct costs.

11. The LECs had two opportunities -- the tariff review process and this investigation -- to demonstrate the reasonableness of LIDB rates. The LEC decision to base investment, and hence rates, on proprietary data not filed with the Commission limits our ability to assess the reasonableness of the LIDB rates.[21] In general, we agree with those commenters who argue that, absent access to the model employed to determine the direct unit investment used to

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[9] *Designation Order*, 7 FCC Rcd at 2169.

[10] We address the designated issues out of sequence here.

[11] *Designation Order*, 7 FCC Rcd at 2169.

[12] *See* Appendix D. Each of the LIDB providers filed multiple *ex partes* in this proceeding. The *ex partes* listed in Appendix D are those which either provide justification for existing rate levels, or propose rate reductions.

[13] Ameritech Direct Case at 9; Bell Atlantic Direct Case Supplement at 2; BellSouth Direct Case at 1; GTE Direct Case at 20; NYNEX Direct Case at 14; Pacific Direct Case at 1, 5; SNET Direct Case at 7; Southwestern Direct Case at 16; United Direct Case at 5; US West Direct Case at 12.

[14] *See* Appendix C.

[15] Ameritech, Bell Atlantic, NYNEX, Pacific Bell, SNET, Southwestern and United used CCSCIS. US West used its own SS7 Cost Model, which is actually similar in concept to CCSCIS. BellSouth and GTE did not use CCSCIS.

[16] *See, e.g.*, Ameritech Direct Case at 12; NYNEX Direct Case at 16; Pacific Direct Case at Att. A, p. 1.

[17] Allnet Comments at 3-5; CompTel Comments at 1-2; ITI Comments at 1; MCI Comments at 19; Sprint Comments, *passim*. For a more detailed discussion of the comments of CompTel and ITI, see ¶ ¶ 35-38, *infra*.

[18] Allnet Comments at 3-5; MCI Comments at 19; Sprint Comments, *passim*.

[19] *See* Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Policy and Rules Concerning Rates for Dominant Carriers, CC Docket Nos. 89-79 and 87-313, 7 FCC Rcd 5235 (1992), *recon. pending*. *See also* Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Policy and Rules Concerning Rates for Dominant Carriers, CC Docket Nos. 89-79 and 87-313, 6 FCC Rcd 4524, 4531 (1991) (*Part 69/ONA Order*).

[20] Direct investment is the one-time cost of the equipment used to provide the service. Direct costs are the on-going costs of providing the service; at a minimum, these include depreciation, return on investment, and taxes.

[21] Both the CCSCIS model used by several of the companies in these filings and the Switching Cost Information System (SCIS) model used in the ONA filings are engineering based models which determine unit investment for a service.

set the rates for a service, we cannot accurately assess the reasonableness of the rates for that service.[22] However, for both those LECs which relied on proprietary data and those which did not, the reasonableness of the amount of the direct investment used to provide the LIDB service can be evaluated by comparing the proportion of investment assigned with LIDB's proportion of demand for all services which use the equipment.[23]

12. As a result of our analysis we find that: (1) the amount of investment allocated to LIDB is consistent with the relative use of that investment to provide LIDB service; (2) in their responses to the data request, most of the companies justified the amount of direct costs claimed in their tariff filings; and (3) in many cases, the amount of overhead loadings has not been justified.[24] Taken together, these specific conclusions support our finding that eight of the carriers failed to meet their burden of proof under the new services test and have failed to justify the rates originally filed. We conclude that the filed LIDB query rates for Ameritech, Bell Atlantic, BellSouth, GTE, NYNEX, Pacific, United and US West, are excessive and therefore unjust and unreasonable.

13. Since the direct cases were filed, however, the LECs have provided additional information to us that would justify lower rates than originally proposed. We find the rates most companies proposed in their *ex partes* do reflect reasonable direct costs and overhead loadings, so that the carriers have met their burden of justifying these rates at their reduced levels. Specifically, the carriers have either reduced their overhead loadings or direct costs, or have supplied a justification for their originally filed rates.[25] We find the reduced rates listed in the *ex parte* filings of Ameritech, Bell Atlantic, BellSouth, GTE, NYNEX, Pacific, United and US West to be just and reasonable. The eight companies are permitted to revise their rates as proposed in their *ex partes*,[26] and listed in Appendix C, and are required to issue refunds with simple interest.[27] The newly-filed rates would be the going-in rates for the service, *i.e.*, the rates used to calculate the price cap indexes as of July 1, 1993. Therefore, these eight carriers would recalculate the price cap indexes using the newly-filed rates. We also direct the LECs to file with the Commission, within 30 days of the release of this Order, a report describing in detail their plans for effectuating these refunds.[28] Once these rates are rolled into the indexes, the normal price cap rules governing rate revisions apply to these rates. Price cap limits and service band limits should assure the reasonableness of rates and eliminate the need for further limitations on rates.

B. Description of Service

14. In the *Designation Order*, the Bureau asked whether the LECs adequately described the LIDB query service in the tariffs. Despite the varying level of detail in the LIDB tariffs, the LECs generally responded that they had adequately described the LIDB service in their tariffs.[29] However, some LECS offered to amend their tariffs to address some of the specific concerns raised by the commenters[30] and others provided additional details about LIDB service in their pleadings.[31]

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[22] *Compare* Commission Requirements for Cost Support Materials to be Filed With Open Network Architecture Access Tariff, 7 FCC Rcd 1526 (Com. Car. Bur. 1992) (*SCIS Disclosure Order)* (in which the Bureau required SCIS models to be filed and redacted versions to be made available to the parties).

[23] In the Open Network Architecture (ONA) context, developing rates for several hundred service functions on a consistent basis requires the carrier to allocate investment within the switch by a method that (i) reasonably reflects each service's use of internal switch components, and (ii) in the aggregate, allocates the entire switch investment as the functions provided evolve and demand for these functions changes. The complexity inherent in this process of first dissecting the engineering functions of individual switch components, and then allocating the associated investment to individual service functions, practically requires a computerized model that replicates the internal architecture of the switch as a series of mathematical expressions or algorithms. Because the accurate development of such a computer model in turn requires that the modeler have access to the detailed design and performance characteristics of individual switch components, any reasonably consistent approach to rate development for ONA elements inherently entails the use of proprietary switch vendor data. *See SCIS Disclosure Order*, 7 FCC Rcd at 1534-1538.

In contrast, in the LIDB context, the multiple services to which common investment must be allocated are provided at a more aggregated level of engineering function, which does not raise such constraints. In developing LIDB rates there is no necessity to allocate investment associated with internal switch components, and hence no necessity to resort to computer models that are dependent on proprietary vendor data. Thus, for example, we are able to examine the reasonableness of the investments assigned to LIDB based on the service's relative usage of functions provided by complete, "off-the-shelf" equipment units, rather than being constrained to rely on a SCIS-like or other engineering model to disaggregate investment associated with the equipment's internal components.

[24] Our evaluation of these costs, including specification of deficiencies in the direct cases, is explained in Appendix C.

[25] SNET and Southwestern, in their *ex parte* filings, have adequately justified their filed rates, and we find those rates just and reasonable.

[26] *See ex partes* listed in Appendix D.

[27] The affected carriers have voluntarily agreed to reduce their rates. Furthermore, this is the first time that rates have been investigated under the new services test. Therefore, we believe that simple interest is appropriate in this case.

[28] We require the companies to submit their plans for issuing refunds, and delegate to the Common Carrier Bureau authority to review and approve those plans. Because the LECs would have had flexibility under the price cap rules to change their LIDB rates once those rates were rolled into the indexes on July 1, 1993, the LECs should include in their plans a detailed explanation of their computation of the refund amount which accrued after that date.

[29] Ameritech Direct Case at 4, Reply at 3; Bell Atlantic Direct Case at 1, Reply at 1; BellSouth Direct Case at 1, 3, Reply at 2-3; GTE Direct Case at 3-4, Reply at 2; NYNEX Direct Case at 3, Reply at 2; Pacific Direct Case at 2, Reply at 7-8; SNET Direct Case at 3, Reply at 2; Southwestern Direct Case at 1, Reply at 2; United Direct Case at 2-3, Reply at 1; US West Direct Case at 3, Reply at 7.

[30] *See* Ameritech Direct Case at 8; NYNEX Direct Case at 9, Reply at 6.

[31] *See, e.g.*, Bell Atlantic Direct Case at 1-2.

1. Frequency, Nature and Priority of Database Updates

a. Pleadings

15. The Bureau asked whether LECs should provide additional information describing the updating process for the LIDB. Carriers do not agree upon the level of detail that should be contained in the tariffs concerning updating of customer information, as well as other parameters of the LIDB service. Ameritech and others argue that tariffs do not and should not spell out every technical detail and nuance of the service.[32] Rather, insists Ameritech, the technical details of the service should be left to separate technical publications.[33] In contrast, Bell Atlantic describes its updating procedure in its Direct Case, and GTE spells out its practices in its tariff.[34] NYNEX, while contending that no further detail is needed, has agreed to amend its tariff to include a provision stating that (1) routine updates of its LIDB will be conducted daily during normal business hours; and (2) its LIDB will be updated twenty-four hours per day, seven days per week to reflect restrictions on NYNEX calling card use arising from suspected fraudulent activity.[35]

16. MCI and Allnet argue that the LECs' LIDB tariffs must include the frequency of database updates, the type of information that is included in the updates, and how quickly the LEC updates data from time of receipt.[36] Allnet asserts that if there was competition for LIDB services, minimum service guarantees and technical specifications would be included in the service contract.[37] However, Allnet asserts that because LIDB validation is a monopoly service, the Commission should require the LECs to describe the minimum performance that is guaranteed.[38] MCI contends that when tariff terms are not explicit, the service provider has free rein to vary them at will depending upon its market objectives. MCI also asserts that in some cases the LECs have actually failed to provide service.[39]

17. MCI insists that LEC fears about sophisticated telecommunications customers using the tariffs as "how-to-commit-fraud" manuals are groundless. MCI argues that the inclusion of specific fraud control mechanisms in the access tariff would reduce the incentive sophisticated users would have to abuse the LIDB.[40] MCI requests that the LECs, *inter alia:* (1) establish a threshold number of attempts after which a card or billed number would be automatically invalid; (2) set low and high velocity checks (of card use or billed numbers) that would send warnings to either investigate or invalidate the card or billed number; and (3) utilize different threshold levels for different classes of customers in their tariffs, since different classes of customers require carrier intervention to prevent fraud at varying threshold levels of usage.[41]

18. In their replies, Ameritech and others argue that much of the information which MCI demands is either part of their procedures or already in their tariffs.[42] Others adhere to the position that the tariffs, as filed, adequately describe the LIDB service.[43] Most of the LIDB providers also dispute MCI's allegation that fraud protection under the LIDB system has been inadequate due to inaccurate information in the database.[44]

b. Discussion

19. Section 61.54(j) of the Commission's Rules, 47 C.F.R. Section 61.54(j), requires that the general rules, including definitions, regulations, exceptions, and conditions which govern the tariff be stated clearly and definitely. In this respect, we agree with MCI, that a purchaser of LIDB service has a right to expect that the LIDB provider express in clear and unambiguous terms certain general parameters of the service, *i.e.*, frequency of database updates, the type of information that is included in the updates, and how quickly the LEC updates data from time of receipt, the type of information stored in the database, and any other general technical information. Indeed, some LECs have either provided some of this information in their tariffs or have indicated that they will amend their tariffs to include it. For those LECs that have not included this information in their tariffs, we require this additional material to be included pursuant to Section 61.54(j).[45] Those carriers that need to amend their tariffs are: Ameritech, Bell Atlantic, BellSouth, GTE, NYNEX, Pacific, SNET, United, and US West.

2. Fraud Control and LEC Liability

a. Pleadings

20. In addition to raising vagueness and ambiguity issues generally, the *Designation Order,* responding to petitioners' arguments, asked for comment on how vagueness in the tariff related to fraud issues. The *Designation Order* also asked parties to comment on whether LECs would be liable for erroneous information in the database. As discussed above, the LECs generally find their tariffs sufficient, arguing that no additional detail is needed to guard against fraud. Further, without exception, the LECs argue that the general limitation of liability contained in the tariff applicable to other LEC services is sufficient and properly applies to LIDB services.[46] Typically, the LECs

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[32] Ameritech Direct Case at 4; BellSouth Direct Case at 1; NYNEX Direct Case at 9; Pacific Direct Case at 2; United Direct Case at 2.

[33] Ameritech Direct Case at 4.

[34] Bell Atlantic Direct Case at 1-2; GTE Direct Case at 3-4. US West and Ameritech object to providing further detail in their tariffs, although they do explain the updating and fraud prevention and detection techniques at length in their pleadings. *See* US West Direct Case at 6-8; Reply at 8; Ameritech Reply at 3-6.

[35] NYNEX Direct Case at 9-10.

[36] MCI Comments at 5; Allnet Comments at 2.

[37] Allnet Comments at 2.

[38] *Id.*

[39] MCI Comments at 5.

[40] *Id.* at 13.

[41] *Id.* MCI also indicates that it would support other LEC actions which would also reduce fraud.

[42] Ameritech Reply at 2-3; GTE Reply at 2-5; NYNEX Reply at 6-8; SNET Reply at 2; Southwestern Reply at 2-6; US West Reply at 7-8.

[43] Bell Atlantic Reply at 1-2; BellSouth Reply at 2-3; Pacific Bell Reply at 7-8; United Reply at 1;

[44] Ameritech Reply at 2-3; Pacific Bell Reply at 8; United Reply at 5-6; US West Reply at 8.

[45] *See, e.g.,* Southwestern Bell Tariff F.C.C. No. 73, Page 24-7, Section 24.3.3.

[46] Ameritech Direct Case at 6; Bell Atlantic Direct Case at 3; BellSouth Direct Case at 2-3; GTE Direct Case at 5, 7-8; NYNEX Direct Case at 4-9; Pacific Direct Case at 3-4; SNET Direct Case at 4-5; Southwestern Direct Case at 2; United Direct Case at 3-4; US West Direct Case at 4-7.

indicate, the language in the liability section of the tariff provides that in the absence of willful misconduct, the carrier's liability to customers is limited to an amount equal to the charge to the customer for the service for the period for which the service was affected.[47] GTE and NYNEX argue that the reasonableness and enforceability of liability provisions have been recognized by the courts for some time.[48] Both carriers contend that the United States Supreme Court affirmed the validity of limitation of liability clauses for public utilities in *Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566 (1921).

21. GTE and Pacific argue that it would be inappropriate for carriers to be liable to customers for damages resulting from erroneous information or fraud beyond the LIDB query charge.[49] Pacific asserts that if it were to compensate customers for such damages, Pacific's rates for LIDB service would have to be increased.[50] Southwestern and GTE contend that the primary purpose of allowing access to billing information residing in the LIDB is to assist customers in making their decision whether to extend credit to the caller, not to guarantee a revenue stream.[51]

22. US West further asserts that it should not be the calling card issuer or provider of LIDB service who bears the risk of loss, but rather the company that retains the toll revenues on calls completed using the card. US West argues that unlike commercial credit cards, LIDB is not a service arrangement wherein the LEC proposes to buy all of MCI's receivables for calling cards and incur all loss for fraud and should not be treated as such.[52]

23. MCI responds that the LECs must implement fraud controls and assume responsibility for incorrectly validated calling cards.[53] MCI states that when IXCs query the LIDB, the LECs respond by indicating whether or not a particular calling card or billed number being used by a LEC customer should be honored. This information is essential to the IXC's decision to complete the call.[54] MCI also points out that the IXCs have no other way to obtain this information. Therefore, concludes MCI, the only way to deter fraud is to establish a reliable means of detecting invalid cards in the LIDB. However, complains MCI, the LEC direct cases do not include adequate fraud control mechanisms.[55] MCI disputes LEC claims that they already have financial incentive to reduce fraud.[56] MCI also claims that some LECs are not updating their database on weekends to reflect notification of lost or stolen cards, which MCI insists is one of the prime times for fraudulent use of calling cards.[57]

24. MCI takes issue with US West's attempt to distinguish LEC joint use cards from commercial credit cards for purposes of limitation of liability. MCI argues that in both cases, only the card issuer has knowledge of the end user consumer's card history and alleges that the only difference between the two services is the fact that there are alternative providers of commercial credit cards.[58] MCI contends that because the LECs have a monopoly over LIDB information needed by the IXCs they are thereby able to provide a product which is inferior to commercial credit cards. MCI also argues that, in contrast to the LEC joint use cards, every other issuer of a telecommunications calling card must assume some liability for fraud. Therefore, says MCI, for the LECs to absolve themselves of all liability for misuse and theft of calling cards is unreasonable.[59]

25. Ameritech and Bell Atlantic respond that MCI is really requesting that the Commission force LEC LIDB services to include billing and collection functions traditionally performed by commercial credit card companies. Pacific asserts that LIDB validation will in almost all cases be considerably cheaper than the acceptance fees charged by commercial credit card companies to merchants.[60] Ameritech and Bell Atlantic argue that these liability issues are properly left to nonregulated, individually-negotiated billing and collection agreements.[61]

26. Ameritech further asserts that there is no need to create an artificial incentive to control fraud, since Ameritech is a very large user of LIDB for intrastate calling card calls and already has a very powerful incentive to control fraud on its calling cards.[62] LIDB was designed and priced for the sole purpose of providing users access to Ameritech's validation databases.[63] GTE, NYNEX and BellSouth question why errors in the provision of LIDB Access should be governed by a different standard of liability than is applied to all other tariffed interstate services and assert that there is no reason to distinguish LIDB from other offerings.[64]

b. Discussion

27. Limitation of liability provisions have long been accepted by the courts in the absence of willful misconduct or gross negligence.[65] Consequently, clauses limiting a carrier's financial liability to the cost of the service are found in virtually all common carrier tariffs. The LECs claim that their liability for incorrect LIDB validations is properly limited by tariff provisions that provide that in the

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[47] *See, e.g.*, NYNEX Direct Case at 4, citing NYNEX Tariff F.C.C. No. 1, Section 2.1.3(A). *See also*, Ameritech Direct Case at 6; BellSouth Direct Case at 2-3; GTE Direct Case at 5; Pacific Direct Case at 3; SNET Direct Case at 4, Reply at 6; United Direct Case at 4; US West Direct Case at 7.

[48] GTE Direct Case at 5-6; NYNEX Direct Case at 6-8.

[49] GTE Direct Case at 7; Pacific Direct Case at 3.

[50] Pacific Direct Case at 3. *See also* US West Direct Case at 6-7.

[51] GTE Direct Case at 8; Southwestern Direct Case at 2.

[52] US West Direct Case at 6-7.

[53] MCI Comments at 12.

[54] *Id.*

[55] *Id.* at 12-13, citing Southwestern Direct Case at 1-2 and United Direct Case at 4.

[56] *Id.* at 14-15, citing NYNEX Direct Case at 8; GTE Direct Case at 6; US West Direct Case at 5-6; Pacific Direct Case at 3; United Direct Case at 3; Bell Atlantic Direct Case at 2-3; Ameritech Direct Case at 6-7; SNET Direct Case at 3-4.

[57] *Id.* at 5.

[58] *Id.* at 16.

[59] *Id.*

[60] Pacific Reply at 9.

[61] Ameritech Reply at 7; Bell Atlantic Reply at 4.

[62] Ameritech Reply at 6-7. *See also*, Bell Atlantic Reply at 2; BellSouth Reply at 4-5; GTE Reply at 7; NYNEX Reply at 3-4; Pacific Reply at 8-9; SNET Reply at 5-6; United Reply at 5-6.

[63] Ameritech Reply at 7.

[64] GTE Reply at 7; NYNEX Reply at 4; BellSouth Reply at 4-5. BellSouth also notes that LECs have historically been permitted to exclude these "speculative" consequential damages in the interest of preserving lower rates.

[65] *See, e.g., Western Union Telegraph Company v. Esteve Brothers & Co.*, 256 U.S. 566, 571 (1921); *Primrose v. Western Union Telegraph Co.*, 154 U.S. 1 (1894); *Robert Gibb & Sons, Inc. v. Western Union Telegraph Co.*, 428 F. Supp. 140 (D.N.D. 1977).

event of service outages LECs must refund "an amount equal to the proportionate charge for the service for the period during which the service was affected. . . ."[66] NYNEX and other LECs interpret this to mean that in the event an incorrect validation is provided to a LIDB customer the LEC is required to refund an amount equal to the charge to the customer for processing the validation.[67] The users of LIDB query services argue, however, that the Commission should require LECs to assume a greater liability for toll fraud that occurs using LEC joint use cards.

28. Calling card fraud involving LEC joint use cards raises difficult policy questions not easily or appropriately resolved in the context of a tariff investigation. Fraudulent use of the telephone network also raises serious public policy issues, since fraud creates uncollectibles that become part of carrier costs. However, the evaluation of the creditworthiness of an end user and prevention of fraud are at the very heart of why a customer orders LIDB service. This information is necessary in order to adequately inform LIDB customers of the nature of the LIDB service and what protections they can expect when ordering the service. It also appears that the LECs are uniquely in control of the accuracy of the information in the LIDB database. On the other hand, different factual circumstances arising in fraud cases could make it unfair to assign all liability to the LECs for all costs arising from fraudulent calls using LEC joint use calling cards. For example, the LECs allege that some operator service providers (OSPs) decline to query LIDB for all calls and thus subject themselves to an increased risk for toll fraud.

29. In general on toll fraud matters, deciding which party is in the better position to contain unauthorized use, and who should be liable for toll charges from fraudulent calls, often depends on the facts and circumstances surrounding each case. We nevertheless believe that we should address the issue of liability for toll fraud in a more comprehensive way. We therefore anticipate initiating a rulemaking proceeding shortly where we will undertake a global examination of issues related to both customer premises equipment (CPE) and network-based toll fraud as well as tariffed limitations on liability for charges due to toll fraud.

30. We do, however, have serious concerns about the adequacy of existing toll fraud detection and prevention procedures of some LECs. As discussed below, we require the LECs to file tariff revisions outlining their procedures and we anticipate that they will strengthen them to accord with the best industry practices. We will not, however, during the interim period pending completion of the broader rulemaking, prescribe additional exclusions to limitations of liability other than the existing exclusions for acts of willful misconduct or gross negligence, so long as the LECs' tariffs contain adequate provisions regarding response to possible fraudulent card use as described in paragraph 32, *infra*. We reach this conclusion because the record here provides an insufficient basis to prescribe a particular allocation of liability between LECs and LIDB customers, because there are factual problems inherent in toll fraud issues like the ones in this case, and because we anticipate developing a more comprehensive approach to liability sharing issues, with a better record, in the upcoming rulemaking. In the interim, LIDB customers will be protected by the strengthened fraud prevention and detection procedures we expect will be implemented as a result of this decision.

31. IXCs' comments on this issue also focus on whether the absence of specific language explaining how a LEC responds to possible fraud permits the LECs too much flexibility in applying or amending their practices. IXCs have expressed grave concern about the inadequacy of several LECs' mechanisms to properly update and monitor LIDB. A number of the LECs in this investigation have tariffed specific language in this regard. Some of the procedures that the LECs claim to have in place include: (1) identifying the information contained in the database, *e.g.*, working telephone numbers, calling card numbers; (2) updating the LIDB database each business day by adding, deleting and modifying end user customer accounts as such customers move, become delinquent on their accounts, order service or cancel service; and (3) emergency updating capabilities to address lost or stolen cards.[68]

32. Given that the service the LECs are offering is a validation service we think that it is, at a minimum, reasonable and, in addition, a beneficial practice for carriers to use adequate procedures to assure the quality of validation information. We are concerned that several of the LECs have not adopted adequate monitoring and updating practices to prevent the transmission of erroneous LIDB information. LIDB providers need to amend their tariffs to come into compliance with Section 61.54(j) of the Commission's Rules by identifying in their tariffs what fraud control procedures they have in place. We will carefully examine the LIDB providers' revisions to identify those procedures. We will not hesitate to prescribe maintenance and fraud prevention measures if we see that individual carriers' practices are not in line with best industry practices.[69] Moreover, we may find it necessary to revisit our conclusion that the limitations on liability for LIDB queries are reasonable as an interim matter, if LECs do not ensure that their tariffs satisfy our concerns. We direct the Commission staff reviewing the carriers' tariff revisions to ensure that carriers are taking the steps necessary to promptly update and monitor the LIDBs in accordance with their commitment to provide LIDB service.

33. We note that while each LIDB provider should maintain an accurate, up-to-date database, it is essential that LIDB customers also assist in this process. Reciprocity in the sharing of data is helpful to ensure that database information concerning the status of the line or calling card is the most current. Since fraud can only be battled effectively through cooperation among the users of the network, it is important that LIDB customers do their part.

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[66] In its tariff NYNEX, for example, states that: "... the Telephone Company's liability, if any, shall not exceed an amount equal to the proportionate charge for the service for the period during which the service was affected..." *See* NYNEX Tariff F.C.C. No. 1, Section 2.1.3(A).

[67] NYNEX Direct Case at 4-5. Of course, in order to receive refunds for the relevant queries, the customer has to establish that an error was made by the LECs.

[68] *See, e.g.*, GTE Tariff F.C.C. No. 1, Page 249.1, Section 8.8(C)(1); Southwestern Bell Tariff F.C.C. No. 73, Page 24-7, Section 24.3.3.

[69] For instance, several LECs either have tariffed or describe in the record procedures which include LIDB updates 24 hours a day, 7 days a week, to eliminate promptly a positive validation message when unusual card calling patterns are detected or a card is reported lost or stolen.

34. During recent *ex parte* discussions with the ten LIDB providers involved in this investigation, most stated that they are willing to discuss the question of liability for incorrect validation information with LIDB customers.[70] During this interim period, while our rulemaking is pending, we encourage the LECs to enter into good faith negotiations with all IXCs that desire some form of fraud protection on LEC joint use calling cards.[71] Of course, we expect LECs to negotiate in good faith with all LIDB customers and to make similar arrangements available to all such customers.[72]

3. Mutual Honoring Agreements

a. Pleadings

35. An issue not specifically identified in the *Designation Order* was raised by CompTel and ITI. These carriers allege that while the LEC LIDB providers are arguing that they should not be required to assume liability for validation errors and fraudulent use, this is, in fact, the arrangement that most of these same LECs have offered to AT&T through Mutual Card Honoring Agreements.[73] Consequently, argue CompTel and ITI, because of the inconsistency between the mutual honoring agreements and the proposed limitations on LEC liability in the LIDB tariffs, the LECs are unlawfully discriminating against LIDB customers in favor of AT&T.[74]

36. In addition, CompTel and ITI assert that the indemnification provisions contained in mutual honoring agreements raise a question about whether LIDB rate levels are reasonable. Specifically, these commenters allege that since the LECs argue that full liability for fraud would cause the rates for LIDB service to rise, the LECs' indemnification of AT&T must similarly increase their validation costs.[75] CompTel and ITI insist that it would be unreasonable to require competitive IXCs to bear both the entire risk of fraudulent use of their own networks and any part of the costs of fraud on AT&T's network. While ITI does not dispute that, pursuant to Section 211 of the Communications Act, common carriers are permitted to arrange their relationships through contracts as well as tariffs, ITI argues that those contracts may not lawfully discriminate among carriers and cannot offer terms and conditions inconsistent with tariffs required by the Commission.[76] CompTel and ITI ask the Commission to investigate these allegedly discriminatory, off-tariff arrangements between AT&T and the LECs.[77]

37. Pacific and US West first reply that any discussion of mutual honoring agreements is beyond the scope of this proceeding.[78] Most of the carriers, however, do respond to ITI's and CompTel's allegations. Ameritech, Bell Atlantic, BellSouth and other LECs dispute the allegations of unreasonable discrimination raised by ITI and CompTel as being unfounded. These LECs argue that the mutual honoring agreement is an unregulated billing and collection agreement and assert that this type of agreement can be negotiated with any interested IXC.[79] Furthermore, argue the LECs, ITI and CompTel have misrepresented the content of these agreements.[80] United asserts that a mutual honoring agreement is not a substitute for purchasing LIDB validation services under United's LIDB tariff, and insists that none of the costs of the mutual honoring agreement are being recovered under its LIDB tariff.[81]

b. Discussion

38. We believe that the issues raised by ITI and CompTel are beyond the scope of this investigation. Indeed, the agreements themselves are not even on the record of this proceeding. Any objection concerning a mutual honoring agreement is not a specific problem with the facial provisions of the LIDB tariffs but rather deals with private agreements among specific parties that are more appropriately left to the Commission's complaint process. Moreover, there is no evidence from the LECs' cost support that the LIDB rates include any LEC costs associated with AT&T toll fraud. Of course, since Section 202(a) of the Communications Act prohibits unjust or unreasonable discrimination by any means or device, a mutal honoring agreement that creates an unreasonable preference favoring one IXC with respect to a LEC's liability for erroneous information in its database, in comparison to liability provisions contained in LEC access tariffs, would violate the Communications Act.

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[70] *See* Appendix E for a list of the companies' *ex partes* reflecting these discussions.

[71] *See* ¶ ¶ 35-38, *infra*.

[72] Some variations may be necessary due to differences in customer usage and calling patterns.

[73] CompTel Comments at 1-2; ITI Comments at 1.

[74] CompTel Comments at 1-2; ITI Comments at 1. CompTel and ITI argue that, pursuant to the mutual honoring agreements the LECs are reportedly required to buy the accounts receivable associated with calls charged to the LEC calling cards which utilize AT&T's network--the LECs are liable for all fraud occurring on AT&T's network for interLATA usage of LEC calling cards, while AT&T maintains all responsibility for fraud occurring on the LECs' networks for intraLATA usage of AT&T Card Issuer Identification (CIID) cards. *Id.* at 3 *citing* AT&T Comments in CC Docket No. 91-115, Attachment B at 3-4.

[75] CompTel Comments at 5-6; ITI Comments at 4.

[76] ITI Comments at 6-7.

[77] CompTel Comments at 5; ITI Comments at 7.

[78] Pacific Reply at 3; US West Reply at 9.

[79] Ameritech Reply at 12-13; Bell Atlantic Reply at 3; BellSouth Reply at 5-6; GTE Reply at 7-8; NYNEX Reply at 4-5; Pacific Reply at 1-2; Southwestern Reply at 17-18; United Reply at 1-2; US West Reply at 10. SNET did not respond to ITI's and CompTel's allegations. In their replies, the LECs acknowledge that the *LEC Calling Card Practices* order mandates that they offer mutual honoring agreements to all customers.

[80] Pacific Reply at 2. Pacific insists that, nothing in its agreement with AT&T makes Pacific liable for all fraud occurring on AT&T's network for interLATA usage of LEC calling cards, nor does Pacific generally bear the risk of uncollectible calls charged to its card and carried on AT&T's network.

[81] United Reply at 3-4. See also Bell Atlantic Reply at 3; Pacific Bell Reply at 1-2; Southwestern Reply at 17-18.

4. Use of Technical Publications

a. Pleadings

39. The Bureau sought comment concerning the cross-referencing of technical publications in the LIDB access service tariffs. Technical publications are documents that contain the engineering specifications and other service parameters that inform the customer of the pro per method of interconnection and provide other relevant detail concerning the manner in which the service will be provided. Technical publications referenced in a tariff must be publicly available and identified in the tariff. Specifically, carrier tariffs currently list the name of the technical reference and the date on which it was made available to the public. Ameritech, Bell Atlantic, GTE, NYNEX, and SNET assert that the dates of the latest technical publications should be listed in the tariff.[82] US West, on the other hand, urges that the Commission find that the date of each revision of technical publications need not be reflected in LEC tariffs.[83] US West contends that because the evolution of the technical publications involves the input and participation of the industry, the Commission should not require that the date of each revision of technical publications be reflected in the LEC tariffs.[84]

40. MCI argues that LIDB tariffs must include the dates of the latest revisions of referenced technical publications.[85] MCI contends that when tariff terms and conditions are not explicit the service provider has free rein to vary them at will depending upon its market objectives.[86] MCI notes that NYNEX has agreed to provide the current date of technical publications, indicating that arguments raised by other LECs are baseless.[87]

b. Discussion

41. While we support the industry practice of informing customers of proposed changes to technical publications, we agree with NYNEX, GTE, Bell Atlantic, and MCI that carriers should include the most up-to-date information concerning the referenced technical publications in their tariffs.[88] Because the information contained in technical publications includes terms of service, permitting revisions to technical publications without also noting changes in the tariff would place the customer in the unacceptable position of being bound by tariff terms and conditions without being able to determine their particulars. Consequently, we require that carriers state in the tariff the publication and issuance date of the referenced technical document, and the date of each revision.[89] The LEC is responsible for informing any interested party where a copy of the publication can be obtained and may not rely on any technical publication that is not publicly available.

5. Description of Call Gapping and Other Technical Parameters for Processing LIDB Queries

a. Pleadings

42. "Call Gapping" or "Code Gapping" is a procedure that is invoked when the database is receiving more traffic than it is equipped to process. When the traffic volume exceeds the capacity of the database, the switch is instructed by the database to reduce the number of queries being sent to the LIDB. Consequently, when an overload condition exists, call gapping will cause a delay in the processing of a portion of the LIDB queries. The LECs are divided on whether information concerning call gapping should be stated in the tariff. Bell Atlantic, GTE, NYNEX, Pacific, Southwestern, and US West either explain their code gapping procedures or identify the technical publication that describes this process.[90] Ameritech, BellSouth, SNET, and United insist that this information need not be described in the tariff because it is explained in a technical publication.[91]

43. The LECs are also split on whether the tariffs should describe additional technical parameters for LIDB service. US West and BellSouth argue that requiring that the bulk of technical detail be placed in the tariff would unnecessarily enlarge carrier tariffs and would not be consistent with recent practice with respect to switched access tariff filings.[92] BellSouth insists that current editions of technical publications are available and contends that there is no basis for petitioners to differentiate between LIDB access service and interstate access offerings generally.[93]

44. MCI and Allnet argue that the tariffs are not detailed enough and should contain additional technical parameters.[94] MCI insists that the LEC tariffs should contain specific descriptions of each carrier's call or code gapping procedure, including threshold levels that trigger the use of gapping, and LIDB service generally. MCI insists that the lack of specificity about LIDB provides the opportunity for LECs to discriminate between access customers in violation of Section 202(a) of the Communications Act.[95]

b. Discussion

45. As discussed above, we believe that the tariffs of several LIDB service providers are not sufficiently detailed in some areas and need to be supplemented.[96] The Com-

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[82] Ameritech Direct Case at 7; Bell Atlantic Direct Case at 4; GTE Direct Case at 6-7; NYNEX Direct Case at 11-12; SNET Direct Case at 4.

[83] US West Direct Case at 10.

[84] *Id.*

[85] MCI Comments at 5.

[86] *Id.*

[87] *Id.* at 10.

[88] *See* American Telephone and Telegraph Company, Revisions to Tariff F.C.C. Nos. 259, 260, 263, 266, 268, 270, 271 and 273, Transmittal No. 14346, Memorandum Opinion and Order, Mimeo 6295 (Com. Car. Bur.) (Rel. Sept. 8, 1983).

[89] We are particularly troubled by US West's comments that it may not adopt an entire technical publication being referenced. *See* US West Direct Case at 9-10. If US West or any LEC does not adopt the entire technical publication in its tariff, then the filing LEC must also identify those parts of the technical publication that it has adopted.

[90] Bell Atlantic Direct Case at 4; GTE Direct Case at Direct Case at 8-9; NYNEX Direct Case at 10-11; Southwestern Direct Case at 3-4; US West Direct Case at 9.

[91] Ameritech Direct Case at 8; BellSouth Direct Case at 2; SNET Direct Case at 5; United Direct Case at 2-3.

[92] US West Direct Case at 8; BellSouth Direct Case at 2. *See also* SNET Direct Case at 5; United Direct Case at 2-3.

[93] BellSouth Direct Case at 2-3.

[94] MCI Comments at 5-9; Allnet Comments at 2.

[95] MCI Comments at 6.

[96] *See* ¶ ¶ 19, 27-34 *supra*.

mission, however, believes that to place all the technical information in a tariff publication would be unduly burdensome to the reader of the tariff. The Commission practice has been to require technical details in the tariff where they are unusually important for understanding the offering. In contrast, where such detail is not crucial, including that information is not required. In the latter circumstance, the Commission grants a waiver of Section 61.74(a) of the Commission's Rules, 47 C.F.R. § 61.74(a), permitting the carrier to reference the publication without being required to incorporate the entire document into the filed tariff.[97] A grant of this type of waiver, however, is not to be construed as permitting a LEC to make its tariff completely devoid of all technical information. The public must still receive adequate notice of information relevant to the service offered.

46. The code gapping procedure is an element of LIDB service that should be described in the LIDB providers' tariffs. Because the invocation of this process means that a LIDB customer will not be able to validate all joint use calling card calls in equal time frames, it is important that the customer have an understanding of how the process works. Southwestern has already included a description of call gapping in its tariff. Southwestern explains that during an overload condition, automatic call gapping will be invoked, and that this procedure of dropping every one out of three queries received will be applied uniformly to all users of Southwestern's LIDB Validation Service.[98] Adding a description of the procedures used will ensure that customers know what to expect when ordering the service. Therefore, we require the remaining LECs to revise their tariffs to specify their call gapping procedures.

C. Sufficiency of Description of 56 Kbps Common Channel Signalling Interconnection Link

47. In order to access LIDB, customers must purchase a common channel signalling (CCS) interconnection link. In the *Designation Order*, the Bureau asked whether the tariffs should contain additional detail regarding the technical parameters for the CCS interconnection link. In particular, the Bureau noted that the tariff descriptions of the CCS interconnection service cross reference technical publications which state that the CCS interconnection link is technically equivalent to a 56 kbps special access line.[99]

1. Pleadings

48. Ameritech, Bell Atlantic, and the other LECs assert that their tariffs contain technical references to extensive information about CCS interconnection and service parameters for both CCS interconnection and 56 kbps special access.[100] These carriers insist that the technical publications to which they refer contain all of the technical parameters and other operating information needed by interconnecting customers.[101] Southwestern avers that references to technical publications are proper since the Bureau granted Southwestern a waiver of Section 61.74 of the Commission's Rules, 47 C.F.R. § 61.74.[102]

49. As for the nature of the CCS link, GTE asserts that the interconnection is not merely "technologically equivalent" but, in fact, the same as the interconnection for 56 kbps or DS1 special access services.[103] In describing the service, GTE's tariff specifies that customers may interconnect to GTE's CCS7 network using a 56 kbps interface or a DS1 interface. GTE explains that its tariff contains the same description of technical parameters for interconnection to GTE's CCS network through either a 56 kbps or DS1 interface.[104]

50. By contrast, NYNEX and US West allege that the two services are different, contending that the STP Links used for CCSA interconnection have technical requirements that exceed those of multiplexed 56 kbps data circuits. NYNEX further asserts that in addition to the technical requirements for multiplexed 56 kbps data circuits, the STP Links must be specifically timed, diversely routed and meet specific availability requirements. Finally, NYNEX insists that the STP links have a unique application in network to network CCS signalling.[105]

51. Allnet argues that including information on the technical parameters of the service in the tariff will provide customers with an opportunity to comment on the appropriateness of the initially proposed technical descriptions and any revisions to those descriptions in a timely manner before they are implemented.[106] MCI argues that the LECs must explain any differences between the 56 kbps CCS interconnection link and a 56 kbps special access line.[107] MCI also argues that the fact that most of the LECs use their tariffed 56 kbps Digital Data Service (DDS) special access rates as the rates for their CCS interconnection adds to the confusion. MCI and Allnet insist that this is unsatisfactory and assert that discussions of the differences between the services should not be left to a technical publication.[108]

2. Discussion

52. Whether the 56 kbps CCS interconnection service and 56 kbps special access service are alike or different is immaterial for purposes of this investigation. The Bureau asked whether the 56 kbps CCS interconnection service had been adequately described. We agree with MCI and Allnet that many of the carriers have failed to provide sufficient technical description to make the tariff language unambiguous. All of the LIDB providers should supply at

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[97] Section 61.74(a) states: ". . . no tariff publication filed with the Commission may make reference to any other tariff publication or to any other document or instrument."

[98] Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Section 24.3.9.

[99] *Designation Order*, 7 FCC Rcd at 2169.

[100] Ameritech Direct Case at 9; Bell Atlantic Direct Case at 4-5; BellSouth Direct Case at 3; GTE Direct Case at 12; NYNEX Direct Case at 12-14; Pacific Direct Case 4-5; SNET Direct Case at 5-6; Southwestern Direct Case at 4-5; United Direct Case at 5; US West Direct Case at 10-12.

[101] *See, e.g.*, Bell Atlantic Direct Case at 5.

[102] Southwestern Direct Case at 5.

[103] GTE Direct Case at 12.

[104] GTE Direct Case at 12-13.

[105] NYNEX Direct Case at 13-14. NYNEX states that all of the necessary technical specifications are contained in technical publication TR-TSV-000905.

[106] Allnet Comments at 3.

[107] MCI Comments at 18 *citing* GTE Direct Case at 12; SNET Direct Case at 5; US West Direct Case at 11; NYNEX Direct Case at 14.

[108] MCI Comments at 18-19; Allnet Comments at 3.

least as much technical detail concerning their CCS interconnection link as NYNEX has.[109] Carriers providing a description of the 56 kbps interconnection service lacking the detail contained in NYNEX's tariff shall file revisions to include descriptions of the interconnection service similar to those identified above. These carriers are: Ameritech, Bell Atlantic, BellSouth, GTE, Pacific, SNET, Southwestern, United and US West.

III. CONCLUSION

53. In this Order we have concluded that the rates being charged by eight of the LIDB providers are excessive, because they are based on direct costs and overhead loadings not justified by the carriers, and therefore unjust and unreasonable. We have also determined that revised lower rates prepared by the eight carriers are just and reasonable at those reduced levels, and so have directed eight of the carriers to issue refunds and have permitted them to file new going-in rates for the CCS signalling link, STP port termination, LIDB transport, and LIDB query to reflect the rates proposed in their *ex partes* and listed in Appendix C. We have further concluded that the LEC LIDB tariffs, as filed, lack the clarity and the resulting detail required by the Commission's Rules and have ordered the LECs to amend their tariffs to clarify certain parameters of the LIDB service.

IV. ORDERING CLAUSES

54. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 204(a), and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 204(a), 403, that the LIDB rates contained in the Ameritech Operating Companies Tariff F.C.C. No. 2, The Bell Atlantic Telephone Companies Tariff F.C.C. 1, BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1, GTE Telephone Operating Companies Tariff F.C.C. No. 1, The NYNEX Telephone Companies Tariff F.C.C. No. 1, Pacific Bell Tariff F.C.C. No. 128, United Telephone System Tariff F.C.C. No. 5 and U S West Communications Tariff F.C.C. No. 1 ARE UNLAWFUL.

55. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 204(a), and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 204(a), 403, that the LIDB rates contained in The Southern New England Telephone Company Tariff F.C.C. No. 39 and Southwestern Bell Telephone Company Tariff F.C.C. No. 73 ARE LAWFUL.

56. IT IS FURTHER ORDERED that the LIDB rates, as they are described in Section II.A, *supra*, and Appendix C of this Order, are just, reasonable, and MAY BE FILED by the Ameritech Operating Companies, The Bell Atlantic Telephone Companies, BellSouth Telecommunications, Inc., The GTE Telephone Operating Companies, The NYNEX Telephone Companies, Pacific Bell, United Telephone System and U S West Communications.

57. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 204(a), and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 204(a), 403, that the Ameritech Operating Companies, The Bell Atlantic Telephone Companies, BellSouth Telecommunications, Inc., GTE Telephone Operating Companies, The NYNEX Telephone Companies, Pacific Bell, United Telephone System and U S West Communications SHALL REFUND, with simple interest, the difference between the rate currently in effect in their tariffs and the rates SPECIFIED IN APPENDIX C to those customers that subscribed to their LIDB service during the period from the date their tariffs became effective and the date that the rate as SPECIFIED IN APPENDIX C becomes effective. The companies ARE ORDERED to submit their plans for issuing refunds to the Common Carrier Bureau for review and approval pursuant to our delegation of authority within 30 days of the release of this Order. Interest shall be computed on the basis of interest rates specified by the United States Internal Revenue Service.

58. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 204(a), and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 204(a), 403, that the Ameritech Operating Companies, The Bell Atlantic Telephone Companies, BellSouth Telecommunications, Inc., GTE Telephone Operating Companies, The NYNEX Telephone Companies, Pacific Bell, United Telephone System and U S West Communications SHALL FILE TARIFF REVISIONS not later than five business days from the release date of this Order. The revised rates are to become effective on five days' notice.

59. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 204(a), 205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 204(a), 205, 403, that the Ameritech Operating Companies, The Bell Atlantic Telephone Companies, BellSouth Telecommunications, Inc., GTE Telephone Operating Companies, The NYNEX Telephone Companies, Pacific Bell, United Telephone System and U S West Communications SHALL USE the revised rates to recalculate their July 1, 1993, Actual Price Indexes (API) and Service Band Indexes (SBI).

60. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 204(a), and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 204(a), 403, that the Ameritech Operating Companies, The Bell Atlantic Telephone Companies, BellSouth Telecommunications, Inc., GTE Telephone Operating Companies, The NYNEX Telephone Companies, Pacific Bell, The Southern New England Telephone Company, Southwestern Bell Telephone Company, United Telephone System and U S West Communications SHALL FILE TARIFF REVISIONS not later than five business days from the release date of this Order modifying the terms and conditions of their tariffs to be consistent with this Order. The revisions to the terms and conditions are to become effective on 35 days' notice.

61. IT IS FURTHER ORDERED that Special Permission No. 93-701 IS ASSIGNED and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, ARE WAIVED for the purposes of compliance with this Order.

62. IT IS FURTHER ORDERED that the investigation and accounting order imposed by the Common Carrier Bureau in CC Docket No. 92-24 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

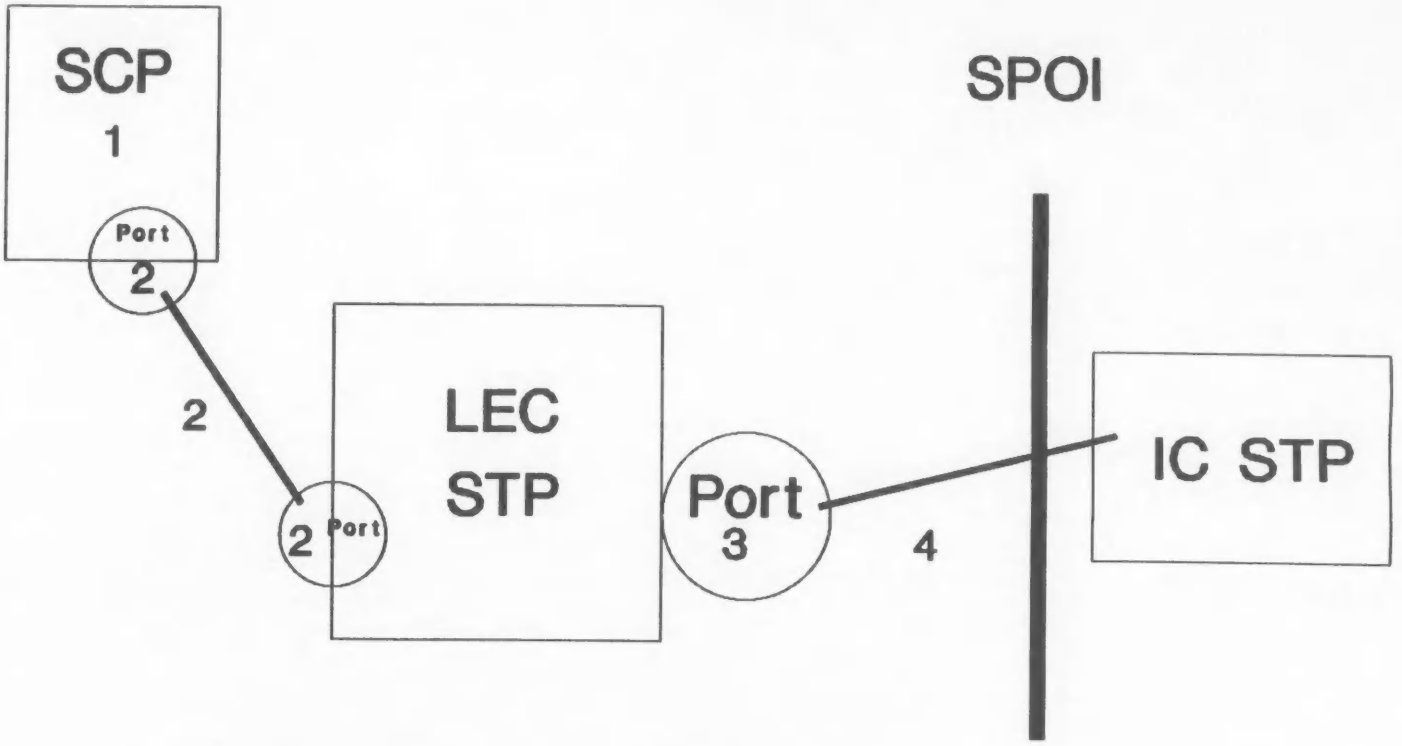
William F. Caton
Acting Secretary

[109] *See* NYNEX Telephone Companies, Tariff F.C.C. No. 1, Section 6.1.3(A)(2)(e).

APPENDIX A

Allnet Communication Services, Inc. (Allnet)
Ameritech Operating Companies (Ameritech)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Telephone Companies (BellSouth)
Competitive Telecommunications Associations (CompTel)
GTE Telephone Operating Companies (GTE)
International Telecharge, Inc. (ITI)
MCI Communications Corporation (MCI)
NYNEX Telephone Companies (NYNEX)
Pacific Bell Telephone Companies (Pacific)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (Southwestern)
Sprint Communications Company Limited Partnership (Sprint)
United Telephone System (United)
US West, Inc. (US West)

APPENDIX B



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Charges allowed under LIDB

1. LIDB Query
2. LIDB Transport
3. STP Port Termination
4. Signalling Link

APPENDIX C

1. The Common Carrier Bureau's data request sought data from the companies on per-unit investment, direct costs, and overheads associated with LIDB rate elements. The Bureau also requested total investment data, along with the amount of that investment assigned to LIDB and other services. Finally, the Bureau asked for data on demand for LIDB and other services. This data was analyzed as described in this Appendix to assess the reasonableness of the companies' rates.

2. To assess the reasonableness of the companies' allocation of investment to LIDB, the Bureau examined the data the companies provided on total investment dedicated to LIDB or common to LIDB and other SS7-based services, and the demand for all services which would use that investment, such as intrastate LIDB service. The data the companies provided in response to the staff's data request indicates that the allocation of investment to interstate LIDB is consistent with the projected relative use of that investment. Thus we conclude that the allocation of investment to interstate LIDB service by the companies is reasonable. We also conclude that, because the resulting investment allocation is reasonable, we do not need to examine the CCSCIS model in this particular case.

3. Second, the Bureau evaluated the relationship of direct cost to direct investment for the LIDB elements.[1] For the four LIDB rate elements, these ratios generally ranged from 20 to 40 percent with some exceptions. The most notable exception was the LIDB Query element, which had a ratio of direct cost to direct investment of over 100 percent for some companies.

4. While we authorized some carrier flexibility in costing methodology in the Part 69/ONA Order[2], the wide variation in this ratio among companies has caused us concern. Typically, direct costs associated with investment reflect depreciation, return, taxes, and other maintenance expenses, such as repair costs and electrical power to run the equipment. For a given type of equipment, we would not expect these ratios to vary much from service to service. There can be legitimate differences between the direct cost to direct investment ratios for an entire category of services and the ratios for an individual service. For example, the categories reflect a number of services, which use differing amounts of circuit equipment, cable and wire facilities, and other types of equipment. These different types of equipment have different depreciation rates and require different levels of maintenance. Thus, any individual service within a category may have a direct cost to direct investment ratio which differs from this ratio for the entire category, because it has a different mix of equipment than does the category as a whole.

5. In most cases, the companies were able to explain their apparently high direct cost to direct investment ratios as the result of additional expenses, such as software fees, or as the result of the characteristics of the equipment used. In the case of the LIDB Query

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[1] Companies are required, as part of their new services showing, to provide us with these ratios.

[2] See 6 FCC Rcd at 4531.

rates, companies adequately justified the ratio of direct cost to direct investment. For this rate element, companies included costs for the Database Administration System (DBAS) and Database Administration Center (DBAC). These are the costs for maintaining and updating the LIDB database itself. They do not reflect the costs of maintaining the equipment itself, as is the case with other equipment accounts, but rather are the costs of maintaining the database which resides in that equipment. As such, these expenses are of a different type than those normally included in direct costs, and thus explain a direct cost level greater than that we would ordinarily expect. Consequently, direct costs for the LIDB Query element appear reasonable. All companies were able to explain higher direct cost factors for the other elements on the basis of different mixes of equipment or of software right-to-use fees.

6. The Part 69/ONA Order also allowed companies to set their rates to reflect appropriate overhead loadings.[3] As with the direct cost to direct investment ratios, our analysis of the level of overheads claimed by the companies, as reflected in their ratios of rates to direct costs,[4] shows some high ratios, and reflects wide variation among companies. Some companies with high overheads attempted to justify them by claiming they were basing their rates on what the market would bear.[5] One company argues that interexchange carriers do not have to accept the company's calling card or to validate the card because the interexchange carriers have several billing options, including calling cards issued by interexchange carriers, commercial credit cards (VISA, Master Card, American Express, etc.) or direct billing arrangements with the customer, such as collect and bill to third number.[6] However, this observation is irrelevant once an interexchange carrier is presented with a LEC calling card for billing. At that time, the interexchange carriers has two choices: validate the card or decline it. There is no other method of validating a LEC joint use calling card except to launch a query into the LIDB. With the large numbers of LEC calling cards in circulation, and the associated potential toll revenues, it is not practical to reject LEC calling cards. Thus, there is no competitive market for LIDB validation.

7. The new services test allows companies to apply only appropriate overhead loadings, which should in general reflect the overhead loadings on similar services.[7] The market argument proffered here does not justify the high overhead ratios the companies claim. The absence of justification for the levels in the companies' filings renders these rates unlawful.

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[3] See 6 FCC Rcd at 4531.

[4] Companies are required to provide us with this ratio as part of their new services showing.

[5] See e.g., Ameritech Direct Case at 10; NYNEX Direct Case at 15, n.25.

[6] Ameritech Direct Case at 10-11; Ex parte from Anthony A. Alessi to Donna Searcy, dated March 23, 1993, at 2-3.

[7] See 6 FCC Rcd at 4531.

8. Most companies have voluntarily reduced rates below the levels originally filed in their transmittals, to levels that reflect lower overhead loadings. After these revisions, we find these overhead levels to be closer to the level reflected in traffic sensitive switched services, and therefore reasonable.

ALLOWED LIDB RATES

	Query Rates	Transport Rates	STP Port Rates
AMTR	$0.027880	As Filed	As Filed
BATR	$0.030846	$0.000200	As Filed
BSTR	$0.032000	As Filed	As Filed
GTTC	$0.035000	As Filed	As Filed
NXTR	$0.031260	$0.000740	As Filed
PTTR	$0.026000	As Filed	As Filed
SNCT	As Filed	As Filed	As Filed
SWTR	As Filed	As Filed	As Filed
USTR	$0.032000	$0.000484	$425.00
UTTC	$0.036600	As Filed	$442.00

USTR	Signalling Link Rates
Option A	
0	$775.49
Over 0 to 8	$884.84
Over 8 to 25	$911.39
Over 25 to 50	$1,084.25
Over 50	$1,495.19
Option B	
0	$161.93
Over 0 to 8	$176.37
Over 8 to 25	$190.23
Over 25 to 50	$226.24
Over 50	$311.86

Note: All other companies' signalling link rates are as filed.

APPENDIX D

Ameritech
Ex Parte letter from Anthony Alessi, Director, Federal Relations, to Donna Searcy, in CC Docket No. 92-24, dated June 1, 1993.

Bell Atlantic
Ex Parte letter from Joseph Mulieri, Director, FCC Relations, to Donna Searcy, in CC Docket No. 92-24, dated May 14, 1993.

BellSouth
1. Ex Parte letter from W.W. (Whit) Jordan, Director, Federal Regulatory, to Donna Searcy, in CC Docket No. 92-24, dated June 2, 1993.

2. Ex Parte letter from W.W. (Whit) Jordan, Director, Federal Regulatory, to Donna Searcy, in CC Docket No. 92-24, dated June 8, 1993.

GTE
1. Ex Parte letter from F. Gordon Maxson, Director, Regulatory Affairs, to Donna Searcy, in CC Docket No. 92-24, dated April 8, 1993.

2. Ex Parte letter from F. Gordon Maxson, Director, Regulatory Affairs, to Donna Searcy, in CC Docket No. 92-24, dated May 18, 1993.

NYNEX
Ex Parte letter from Kenneth Rust, Director, Federal Regulatory Matters, to Donna Searcy, in CC Docket No. 92-24, dated May 17, 1993.

Pacific Bell
Ex Parte letter from Jo Ann Goddard, Director, Federal Regulatory Relations, to Donna Searcy, in CC Docket No. 92-24, dated May 14, 1993.

SNET
1. Ex Parte letter from Rochelle D. Jones (signed by Wendy Bluemling), Director, Regulatory, to Donna Searcy, in CC Docket No. 92-24, dated March 23, 1993.

2. Ex Parte letter from Rochelle D. Jones (signed by Wendy Bluemling), Director, Regulatory, to Donna Searcy, in CC Docket No. 92-24, dated April 8, 1993.

Southwestern
Ex Parte letter from William A. Blase, Jr., Director, Federal Regulatory, to Donna Searcy, in CC Docket No. 92-24, dated April 8, 1993.

United
Ex Parte letter from Richard D. Lawson, Director, Federal Regulatory Relations, to Donna Searcy, in CC Docket No. 92-24, dated May 14, 1993.

US West
1. Ex Parte letter from Janis A. Stahlhut, Director, Federal Relations, to Donna Searcy, in CC Docket No. 92-24, dated May 11, 1993.

2. Ex Parte letter from Janis A. Stahlhut, Director, Federal Relations, to Donna Searcy, in CC Docket No. 92-24, dated May 12, 1993.

APPENDIX E

Ameritech
Ex parte letter from Anthony M. Alessi, Director of Federal Relations, to Donna Searcy, in CC Docket No. 92-24, dated October 26, 1992.

Bell Atlantic
Ex parte letter from Maureen Keenan, Director, FCC Relations, to Donna Searcy, in CC Docket No. 92-24, dated October 23, 1992.

BellSouth
1. Ex parte letter from W.W. (Whit) Jordan, Director - Federal Regulatory, to Donna Searcy, in CC Docket No. 92-24, dated October 26, 1992.
2. Ex parte letter from W.W. (Whit) Jordan, Director - Federal Regulatory, to Donna Searcy, in CC Docket No. 92-24, dated November 10, 1992.

GTE
Ex parte letter from F. Gordon Maxson, Director, Regulatory Affairs, to Donna Searcy, in CC Docket No. 92-24, dated October 27, 1992.

NYNEX
1. Ex parte letter from Kenneth Rust, Director, Federal Regulatory Matters, to Donna Searcy, in CC Docket No. 92-24, dated October 21, 1992.
2. Ex parte letter from Kenneth Rust, Director, Federal Regulatory Matters, to Donna Searcy, in CC Docket No. 92-24, dated October 27, 1992.

Pacific
Ex parte letter from Jo Ann Goddard, Director, Federal Regulatory Relations, to Donna Searcy, in CC Docket No. 92-24, dated October 28, 1992.

SNET
Ex parte letter from Eugene J. Baldrate, Director, Federal Regulatory, to Donna Searcy, in CC Docket No. 92-24, dated October 27, 1992.

Southwestern
Ex parte letter from William A. Blase, Jr., Director, Federal Regulatory, to Donna Searcy, in CC Docket No. 92-24, dated October 22, 1992.

United
Ex parte letter from Richard D. Lawson, Director, Federal Regulatory Relations, to Donna Searcy, in CC Docket No. 92-24, dated November 2, 1992.

US West
Ex parte letter from Janis A. Stahlhut, Director, Federal Relations, to Donna Searcy, in CC Docket No. 92-24, dated October 23, 1992.

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Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-35

In the Matter of

Policies and Rules Concerning
Operator Service Access and
Pay Telephone Compensation

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: August 17, 1993; Released: September 16, 1993

By the Commission:

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I. INTRODUCTION

1. On April 9, 1992, we adopted a *Second Report and Order* prescribing a mechanism by which competitive payphone owners ("PPOs") may collect compensation from certain interexchange carriers ("IXCs") for originating interstate access code calls from their payphones. Eight parties filed petitions for reconsideration of this order.[1]

2. We now affirm the *Second Report and Order* in certain respects and modify it in others. First, we affirm our holding that IXCs must pay PPOs compensation in the amount of $6 per month per payphone. Second, we modify the *Second Report and Order* to allow IXCs to avoid the obligation to pay compensation if they certify that they do not receive access code calls from payphones to which they are not presubscribed. Third, we affirm our decision that each individual IXC's compensation obligation should be apportioned in accordance with its relative share of toll revenues among IXCs required to pay compensation. Fourth, we clarify our requirements pertaining to the customer-owned coin-operated telephone (COCOT) lists provided by local exchange carriers (LECs) to IXCs. We also deny Allnet's Application for Review of a decision by the Common Carrier Bureau relating to the list of carriers required to pay compensation.

II. BACKGROUND

3. In October 1990, Congress enacted the Telephone Operator Consumer Services Improvement Act, which directed, in part, the Commission to consider whether PPOs should receive compensation for originating access code calls.[2] In July 1991, the Commission concluded that compensation should be prescribed and sought comment on an appropriate compensation rate and mechanism.[3] In May 1992, we issued the *Second Report and Order* adopting an interim compensation mechanism.[4]

4. Eight parties filed petitions for partial reconsideration of the *Second Report and Order*. The petitioners focus on the amount of compensation prescribed, the entities that should be required to pay compensation, the mechanism for apportioning the compensation obligation among those entities, and various issues concerning the LEC-provided list of payphones taking COCOT service. While no petitioners urge reconsideration of the flat fee per-phone compensation mechanism, some petitioners argue that the Commission should take various steps to ensure the implementation of a per-call mechanism. Eleven parties filed comments or reply comments.[5]

III. ISSUES

A. Amount of Compensation

1. Second Report and Order

5. In the *Second Report and Order*, we prescribed a compensation rate of $6 per payphone per month to be paid to PPOs for originating interstate access code calls. We stated that there are a number of possible reasonable approaches to compensation, each of which has a rational basis. We then identified three reasonable approaches and concluded that these three approaches establish a range of

[1] Petitions for reconsideration or clarification were filed by APCC, AT&T, CNS, ITI, LDDS, NTCA, USTA, and WilTel.

[2] Pub. L. No. 101-435, 104 Stat. 986 (1990) (codified at 47 U.S.C. Section 226) ("TOCSIA").

[3] Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Report and Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 4736 (1991) (*Further Notice*).

[4] Second Report and Order, 7 FCC Rcd 3251 (1992) (*Second Report and Order*).

[5] All parties who filed pleadings in this reconsideration proceeding are listed in Appendix A.

reasonable compensation rates. We ultimately chose a rate of $6 per month per phone that fell within the middle of this range.[6]

6. One approach we considered was to examine, as a surrogate for PPO costs, the access charge compensation that a LEC receives in its regulated provision of payphones. We noted data submitted by APCC, unchallenged by other parties, showing that the largest LECs attribute an average of $13.74 per month in interstate access charge revenues to each of their payphones. We noted further that, unlike PPOs, which receive commission payments from OSPs, LECs do not receive revenues for 0+ traffic.[7] Because the record showed that access code calls were projected to account for half of all interstate payphone calls after unblocking, we found that it would be reasonable to set PPO compensation at $6.87, which is one half of the $13.74 amount.[8]

7. We also considered the value to OSPs of receiving access code calls and relied upon LEC 0- transfer service charges as a potential measure of this value.[9] We found that the service PPOs provided in originating access code calls was analogous in many respects to the 0- transfer service. Noting that interstate tariffed charges for LEC 0- transfer services are most commonly about $.35 per call, and that data on the record projected approximately 15 access code calls per month per phone, we concluded that a rate of $5.25 per payphone per month would be another reasonable compensation rate.[10]

8. As a third basis for the prescribed compensation amount, we relied upon AT&T O+ commissions. We stated that because AT&T's operator service rates are regulated, AT&T is constrained from paying excessive commissions that provide monopoly rents to PPOs or premises owners. For this reason, we stated that AT&T's commissions were an indicator of the fair value of the service provided by PPOs when they originated an access code call. We concluded from the record that the average AT&T commission payment on an access code call translated into a rate of 40.2 cents per call, or $6.03 per phone using the projected 15 access code calls per month per phone.[11]

2. Positions of the Parties

9. APCC argues that the $6 per payphone compensation rate is insufficient to compensate PPOs for revenues lost when callers make access code calls from a competitive payphone. APCC claims that the Commission erred in relying on OSP commissions retained by PPOs to reduce by half the LEC access charge compensation amount of $13.74. APCC argues that because the 0+ commissions paid by OSPs to PPOs are analogous to the OSP commissions paid to LEC payphone premises owners, PPOs should receive the full $13.74 amount.[12]

10. APCC also argues against the value-based compensation surrogates used in the *Second Report and Order*. APCC claims that the O- transfer rates are not market rates but regulated rates that, therefore, do not reflect the value to OSPs of receiving an operator service call. In addition, APCC asserts that the 0- transfer rates fail to include any element to capture the value of the payphone itself -- the use of a payphone to make an access code call.[13]

11. APCC further argues that AT&T commissions are not representative of the full range of 0+ commission rates available to PPOs in the marketplace. Instead, APCC proposes that the Commission use a composite of commission rates by all OSPs utilized by PPOs. APCC state s that 90 cents per call would be a reasonable rate based on three estimates on the record for the *Second Report and Order:* 1) AT&T commissions of $.30 to $.60 per call; 2) PPO commissions of $.50 to $1, as estimated by Intellicall; and 3) APCC's proposed rate of $2.09, using an "opportunity cost" compensation basis.[14] APCC also argues that the Commission failed to consider that hotels impose a surcharge of 50 cents to $1 for dial around calls.[15]

12. AT&T and MCI contend that APCC's proposed compensation amount of $13.74 per phone per month is flawed. They argue that the Commission, in using LEC interstate access charge compensation as a surrogate for PPO costs in facilitating access code calls, correctly reduced by half the $13.74 amount.[16] AT&T further argues that higher costs associated with live operators on 0- service outweigh any claim by APCC of the value of the use of the competitive payphone.[17] AT&T and MCI also argue that APCC's proposal of using a composite of IXC commissions to reach a compensation amount was disposed of in the *Second Report and Order*.[18] MCI contends that, contrary to APCC's arguments, hotel surcharges have no relationship to the cost of providing dial-around access.[19]

13. Metromedia also opposes APCC's petition, contending that the $6 rate is too high. Metromedia claims that TOCSIA authorizes compensation, to a limited extent, only for revenues lost when the phones were in use by dial-around callers, not for revenues lost because the dial-around callers chose other than the presubscribed carrier.[20]

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[6] *Second Report and Order* at 3255.

[7] A 0+ call occurs when the caller dials plus the called telephone number. 0+ calls include credit card, collect, and third number billing calls. 0+ calls are routed to the carrier prescribed to the originating line. PPOs earn revenues, in part, by presubscribing their payphones to IXCs or OSPs that pay commissions on 0+ traffic. *See Second Report and Order* at 3251.

[8] *Id.* at 3256.

[9] A 0- call occurs when the caller dials only the digit and then waits for live operator intervention. 0- transfer service is a service offered by the LECs under which the LECs transfer a 0- call to the IXC requested by the caller. *Id.* at 3255.

[10] *Id.* at 3256-57.

[11] *Id.* at 3257.

[12] APCC Petition at 3-6.

[13] *Id.* at 7.

[14] *Id.* at 8-9.

[15] *Id.* at 10.

[16] AT&T Comments at 4-5; MCI Comments at 2. Pacific Bell argues that while the difference between $13.74 and that portion of IXC commissions on 0+ calls retained by PPOs might be a reasonable benchmark for compensating dial-around calls, APCC has never stated what this amount is. Pacific Bell Comments at 2.

[17] AT&T Comments at 5-6.

[18] AT&T Comments at 7; MCI Comments at 4.

[19] MCI Comments at 5.

[20] Metromedia Comments at 1-3.

3. Discussion

14. We now deny APCC's motion for reconsideration of the $6 compensation rate. Many of APCC's arguments about the compensation amount were disposed of in the *Second Report and Order*. The few new arguments raised by APCC do not convince us to revise the prescribed $6 amount.

15. First, we reject APCC's argument that we erred in offsetting the full $13.74 LEC access charge compensation amount by half to account for 0+ commissions that a PPO receives from OSPs. In the *Second Report and Order*, we specifically rejected APCC's argument that PPOs should receive the full $13.74 per month that LECs receive in interstate access revenues. We stated that PPOs receive revenues for 0+ traffic, while LECs do not, and concluded that since access code calls were projected to account for half of a PPO's calls, it would be reasonable to award PPOs half of the $13.74 earned by LECs for interstate interexchange payphone calls. We recognized that PPOs must, in order to compete effectively, pay a portion of the 0+ commissions they receive to premises owners, but we rejected the notion that this factor entitled PPOs to the full $13.74. We noted that PPOs are able to keep some of these commission payments themselves and that, as owners of multiple payphones, they are in a position to use their bargaining power to obtain a high enough commission to compensate adequately themselves and the premises owner.[21] APCC has offered no new arguments or data to convince us that our reasoning was flawed.

16. Second, we reject APCC's argument that it was improper to use 0- transfer charges as a surrogate for PPO compensation. In so arguing, APCC apparently misconstrues our purpose in relying on this measure. Specifically, while APCC argues that 0- transfer charges are an inadequate measure of the value of the service provided by PPOs when their payphones are used to make access code calls, we used these charges to indicate the value *to the OSP* of receiving an access code call. While the value of the payphone itself may reflect PPO costs, it does not affect the value to an OSP of receiving a call.[22] We therefore reject APCC's arguments that 0- transfer rates are an invalid surrogate upon which to base PPO compensation.

17. Third, we decline to use the composite of commission rates proposed by APCC. In suggesting this model, APCC, in effect, urges us to consider data on commissions paid to PPOs before competitive payphones were required to unblock 10XXX access. In the *Second Report and Order*, we already rejected the "opportunity cost" approach reflected in these estimates:

> We first reject arguments of several PPOs that their level of compensation should reflect their "opportunity costs" of initiating access code calls in lieu of 0+ calls that produce commissions from a presubscribed carrier. These arguments, most especially as styled by APCC, have as their goal ensuring that PPOs receive the same level of compensation overall for 0+ and access code calls as they did before they were required to unblock access code calls. However, we do not take as our public interest goal the maintenance of the PPO revenue streams that existed while PPOs or premises owners were permitted to funnel *all* operator-assisted traffic (other than 0- traffic) to the presubscribed OSP, whatever the wishes of the caller.[23]

APCC has presented no new arguments to warrant a reversal of this finding. Accordingly, we decline to use its proposed composite rate as a basis for tabulation of the compensation amount.

18. Finally, we decline to use the data presented by APCC on hotel surcharges for access code calls as a surrogate for payphone compensation.[24] Based on a survey of 23 hotels in the District of Columbia, APCC claims that hotel surcharges average $.50 to $1 per access code call. We have doubts as to whether hotel surcharges on calls placed from hotel rooms are an appropriate surrogate for reasonable PPO compensation. However, we need not address this issue because APCC has not, in any case, presented sufficient data about hotel surcharges. We do not believe that a survey of 23 hotels in one city -- one of the most expensive cities in this country -- is a statistically valid survey of hotel surcharges overall. It would be inappropriate for us to adopt a compensation mechanism based on such skewed and incomplete data. In addition, we reject APCC's argument, set forth in an *ex parte* letter filed April 5, 1993, that the $6 amount was flawed in that it assumes that each competitive payphone originates an average of 15 interstate access code calls per month.[25]

B. Entities Required to Pay Compensation

1. Second Report and Order

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[21] *Second Report and Order* at 3256, n.58.

[22] We note that 0- transfer service charges involve the use of a live operator rather than an automated transfer accomplished by the caller's use of 10XXX code. APCC ignores this factor in seeking an adjustment to 0- transfer rates based on the value of the payphone.

[23] *Second Report and Order* at 3255.

[24] APCC Petition at 10.

[25] APCC, citing data filed by AT&T in a proceeding before the Indiana Utility Regulatory Commission, argues that the estimate in the record of 15 interstate access code calls originated by each competitive payphone per month greatly understates the level of dial-around traffic. APCC claims that the AT&T data show that AT&T alone was receiving an average of 17 interstate access code calls per month from each competitive payphone in Indiana. APCC further claims that the Indiana Telecom Corporation (ITC) conducted a survey of 4099 access code calls originated by competitive payphones with station message detail recording (SMDR) in Indiana. According to APCC, the ITC survey showed that 1822 of these calls were delivered to AT&T, while the other 2277 calls were delivered to other IXCs. APCC combines the AT&T data with the ITC survey and reasons that for every Indiana access code call that is delivered to AT&T, 1.25 access code calls are delivered to other IXCs. APCC uses this ratio to conclude that if AT&T receives 17 interstate access code calls from each competitive payphone in Indiana, then other IXCs receive 21 such calls, which equals 38 interstate access code calls originated from each Indiana competitive payphone. Letter from Albert Kramer, Counsel, APCC, to Michael Carowitz, Attorney, FCC, April 5, 1992. AT&T responds by arguing that the Indiana data is not representative of the level of dial-around traffic it receives nationally. AT&T states that the Indiana data was compiled as part of a 13 month national study by AT&T of the amount of dial-around traffic it received from competitive payphones. AT&T states that it has thus far tabulated the results nationally and for four other individual states: California, Texas, Florida, and New Jersey. AT&T states that it receives an average of 9.5 interstate calls

19. In the *Second Report and Order*, we required IXCs to pay compensation if they (1) earned annual toll revenues in excess of $100 million during the previous year, and (2) provided live or automated operator services.[26]

2. Positions of the Parties

20. WilTel and LDDS, supported by ITI and LiTel, seek reconsideration of this requirement. They argue that this requirement unfairly burdens carriers that do not originate access code calls, including those that derive the majority of their revenues from the provision of private line services.[27] ITI argues that its access codes are used only when the premises equipment on an aggregator's presubscribed line is programmed automatically to dial ITI's access code to facilitate routing of 0+ calls. ITI argues that it should, therefore, not be required to pay any compensation to PPOs.[28] LDDS claims that it receives a "very small amount" of dial-around calls.[29]

21. WilTel argues that by including in the compensation pool OSPs who derive little or no revenue from dial-around calls, the Commission will 0 deter private line carriers from entering the OSP marketplace.[30] WilTel further argues that if a WilTel carrier customer pays compensation, WilTel should not be required to pay compensation for revenues received for providing terminating service to complete that carrier's calls.[31]

3. Discussion

22. We conclude that an IXC that does not receive access code calls from payphones on which it is not the presubscribed carrier should be permitted to avoid the compensation requirement. We now modify the *Second Report and Order* to establish a procedure by which these IXCs may have their names removed from the list of carriers required to pay compensation.[32]

23. Each year, typically in June, the FCC issues a staff report entitled "Long Distance Market Shares" which identifies those IXCs with annual toll revenues in excess of $100 million in the previous year. To remove its name from this list for PPO compensation purposes, an IXC must, within 30 days after public notice of the report, file with the Chief, Common Carrier Bureau, a notarized affidavit stating that the IXC does not receive end user-initiated access code calls from payphones on which it is not the presubscribed carrier.[33] The affidavit must be signed by the corporate officer with principal responsibility for operator service operations of the IXC. Affidavits must be refiled each year.

C. Apportionment of the Compensation Obligation

1. Second Report and Order

24. In the *Second Report and Order*, we concluded that each individual IXC's compensation obligation should be set in accordance with its relative share of toll revenues among IXCs required to pay compensation.[34]

2. Positions of the Parties

25. A number of IXCs, including AT&T , WilTel, LDDS, and ITI, seek reconsideration of this toll revenue-based apportionment. WilTel proposes alternative compensation apportionments, based on: 1) switched access usage, 2) switched revenues, 3) switched access surcharges by LECs, or 4) operator service traffic or revenues.[35] AT&T proposes that the Commission use interstate switched minutes as a

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each month nationwide from each non-AT&T presubscribed competitive payphone. It also provides data showing that it receives an average of five interstate calls from each competitive payphone in both California and Texas, four in New Jersey, and 11 in Florida. Letter from Ronald Gramaglia, Federal Regulation Division Manager, AT&T, to Donna Searcy, Secretary, FCC, April 23, 1993. In light of these additional data, we cannot conclude that the Indiana data are more representative of the level of dial-around traffic carried on payphones than are the data on which we based our estimated average of 15 interstate access code calls per month. Consequently, we conclude that the Indiana study does not warrant a change in our compensation rate.

[26] *Second Report and Order* at 3259. In June 1992, three IXCs, AT&T, MCI, and Metromedia, filed Motions for Waiver of their respective obligations to pay compensation under the *Second Report and Order*, until after the Commission vacated the stay of its order requiring the unblocking of 10XXX dialing from competitive payphones. AT&T Motion at 1; MCI Motion at 1; Metromedia Motion at 1. The Commission's stay of the unblocking order expired on January 10, 1993. We now deny the motions to the extent that they seek reimbursement for compensation paid prior to January 10, 1993. None of the IXCs that filed the motions is able to estimate reliably what percentage of traffic it received during this period from 10XXX dialing as opposed to other 1-800 or 950 access code dialing. In addition, we note that, for purposes of these motions, there could be significant administrative burdens involved in adjusting per-payphone compensation based on the date each competitive payphone unblocked 10XXX access.

[27] LDDS Petition at 6; ITI Reply at 3-4; WilTel Petition at 6; LiTel Comments at 8.

[28] ITI Reply at 3-4, n.8 . ITI initially contended that it received no access code calls. ITI Petition at 5. APCC subsequently argued that ITI maintained four 10XXX codes which could be used for access code calls by end users using LEC calling cards. APCC also submitted a signed affidavit from a caller who accessed the ITI network by using the 10805 code and completed a call with a valid LEC calling card number. APCC Opposition to Motion for Stay at 10-11. ITI then altered its position and argued that it did not "generate any significant number of the calls for which the Commission determined that compensation should be paid..." ITI Reply at 3.

[29] LDDS Petition at 5.

[30] WilTel Petition at 5.

[31] *Id.* at 6.

[32] This procedure would permit carriers (such as ITI apparently) that receive access code calls from only their own presubscribed lines to avoid paying compensation. These carriers should not be required to pay compensation because they receive no access code calls for which they are not already paying a 0+ commission. Similarly, an IXC that provides transmission services to another carrier and receives no access code calls itself, would not have to pay compensation. In either case, however, if the carrier receives any user-initiated access code calls from payphones on which it is not the presubscribed carrier, that carrier would be required to participate in the compensation mechanism.

[33] Because the 1993 staff report has already been released, IXCs seeking to exempt themselves from further PPO compensation requirements based on that report must file an affidavit within 30 days of the release date of this Order.

[34] *Second Report and Order* at 3259.

[35] WilTel Petition at 7-8.

basis for apportioning compensation.[36] LDDS, supported by LiTel, argues that the apportionment of compensation should be based on the amount of access code calls received by each individual OSP, or the revenues generated by such calls.[37] Several IXCs argue that a per-phone compensation mechanism using a toll revenue standard for compensation apportionment was adopted without adequate notice to the affected parties.[38] AT&T claims that the toll revenue standard is improper insofar as it reflects both interstate and intrastate revenues.[39]

26. APCC and MCI oppose petitioners' arguments.[40] APCC argues that the Commission made a reasonable choice of allocation methodology from several imperfect alternatives that could only roughly match the compensation burden with the revenues received from access code calling.[41] APCC asserts that, to its knowledge, precise data on total switched revenues and operator services revenues are not readily available. It also asserts that there is no guarantee that these data would lead to a more accurate formulation of a compensation allocation that reflects access code calling.[42]

3. Discussion

27. We now affirm the decision in the *Second Report and Order* to apportion compensation based on toll revenues. Of all of the methods of apportionment urged upon us by the petitioners, using the actual amount of access code traffic or revenues would provide the most rational basis for relating the amount of compensation an OSP pays to the number of access code calls its network actually receives. However, many IXCs do not currently track this information, and AT&T, the largest IXC, does not possess the technical capability to distinguish 10XXX access code calls from 0+ calls.[43] Even LDDS, one of the IXCs which urges the Commission to use the amount of access traffic as the basis for compensation apportionment, states that it is unable to ascertain the number of access code calls it receives.[44] Therefore, it is not feasible to use access code traffic or revenues to apportion the compensation obligation.

28. None of the other methods proposed by parties would represent a more accurate approach than using toll revenues. For example, while the switched minutes approach advocated by AT&T might reduce AT&T's compensation obligation, AT&T makes no showing that this would be a better indicator of access code traffic than a toll revenue-based approach. Moreover, unlike toll revenue data, which are already available, the FCC does not collect data on switched minutes of use for each IXC subject to the compensation mechanism. Similarly, data on operator service traffic and revenues or on switched revenues are not currently available, and no party has shown these data to be a preferable basis for apportionment to toll revenues.[45]

29. We note that entities that do not receive any access code calls from payphones will be able to avoid any compensation obligation they might otherwise have by virtue of their toll revenues. We believe that this allowance will substantially alleviate any inequities associated with a toll revenue-based allocation formula.

30. We reject arguments by several of the IXCs that they did not have adequate notice that the Commission might adopt in the *Second Report and Order* a per-phone compensation mechanism using a toll revenue standard. The *Further Notice* explicitly invited comment on possible compensation mechanisms:

> The record contains no data that are specific or comprehensive enough to support any decision on what compensation charge or formula should be prescribed. We tentatively conclude, however, that a per call charge would be preferable to a per minute charge... We seek comment on this tentative conclusion and *ask interested parties to suggest alternatives to per call compensation.*[46] *In response to the Further Notice*, APCC proposed a flat-rate per-phone compensation mechanism.[47] In addition, several parties filed oppositions or comments in support of this suggestion.[48] Accordingly, we believe that our conclusion to adopt a per-phone compensation mechanism is a logical outgrowth of the issues raised in the *Further Notice*.[49]

D. LEC-Provided COCOT Lists

1. Second Report and Order

31. In the *Second Report and Order*, we required LECs to provide to each IXC responsible for compensation a quarterly list of telephone lines taking COCOT service in the LEC's region. We stated that the format of the COCOT list was to be determined by the LECs and by IXCs paying compensation. We also recognized that there are competi-

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[36] AT&T Petition at 5.

[37] LDDS Petition at 5; LiTel Comments at 1.

[38] LDDS Petition at 6; ITI Petition at 1-2; LiTel Comments at 8.

[39] AT&T Petition at 3.

[40] APCC Comments at 3; MCI Comments at 7.

[41] APCC Comments at 3-5.

[42] *Id.* at 6.

[43] *See* Billed Party Preference for 0+ InterLATA Calls, CC Docket No. 92-77, AT&T Comments at 8.

[44] Letter from Edward A. Yorkgitis, Jr., Counsel, LDDS to Donna R. Searcy, Secretary, FCC, March 2, 1993. WilTel and Metromedia report a similar lack of this data. Letter from Christa B. Jenkins, WilTel to Michael Carowitz, Attorney, Common Carrier Bureau, FCC, March 1, 1993; Letter from Randall B. Lowe, Counsel, Metromedia to Donna R. Searcy, Secretary, FCC, February 24, 1993.

[45] Using a carrier common line surcharge as a means of collecting compensation from IXCs has already been rejected by the Commission. *Further Notice* at 4747. This approach would not only place LECs at the heart of the compensation mechanism, *see* para. 40 *infra*, but would also unfairly spread the cost of compensation among all switched calls.

[46] *Id.* (citations omitted) (emphasis added). In response to AT&T's argument that the toll revenue standard reflects both interstate and intrastate revenues, we note that we do not purport to exercise jurisdiction over intrastate services or revenues, but rather use comparative toll revenues as a basis for apportioning the compensation obligation.

[47] APCC Comments on *Further Notice* at 10-17.

[48] United Reply at 3; MCI Reply at 5; Ameritech Reply at 6-7; US West Reply at 3-4; AT&T Reply at 2; SW Bell at 4; Nycom Reply at 7-9.

[49] *See Public Service Commission of the District of Columbia v. FCC*, 285 U.S. App. D.C. 19, 906 F.2d 713 (1990).

tive payphones that do not use a COCOT line and that, therefore, would not appear on a COCOT list. For these payphones, we held, the PPO is responsible for providing sufficient verification information to those IXCs to which it sends bills.[50]

2. Positions of the Parties

32. AT&T, USTA, NTCA, and CNS filed petitions for clarification of our requirements in this area. They request that we articulate in greater detail our requirements pertaining to the LEC-generated lists.[51]

33. AT&T asks that we specify that each list include, at a minimum: the line number; PPO name and address; PPO customer contact name; payphone location; and service connection and disconnection dates, to the extent applicable.[52] APCC and Pacific Bell oppose this request, and APCC objects, in particular, to AT&T's suggestion that the list include each payphone's location, 4 which APCC claims is proprietary information.[53] USTA also opposes AT&T's request, asserting that it would be burdensome for LECs to provide this information.[54]

34. NTCA requests clarification that LECs must report only those lines that take COCOT service or that LECs can otherwise readily identify as payphone lines.[55] APCC generally supports this request.[56]

35. USTA, supported by MCI and Pacific Bell, asks us to rule that LECs may recover their reasonable costs of providing the COCOT lists.[57] Metromedia opposes such cost recovery.[58] USTA also requests that we require all LECs to use a consistent format for their lists.[59]

36. Finally, CNS asks us to require that the COCOT lists be available to all IXCs, so that those IXCs paying compensation do not have a unique competitive advantage in the payphone marketplace.[60] Bell Atlantic opposes this request and states that it will provide COCOT lists to IXCs paying compensation subject to a confidentiality agreement restricting the use of these lists to PPO compensation purposes.[61] APCC also opposes this request, claiming that widespread availability of this list could increase fraud.[62]

3. Discussion

37. We concluded previously that the details concerning the COCOT list were to be agreed upon by the LECs and those IXCs paying compensation.[63] In the interests of maximum efficiency and flexibility, we continue to favor this general approach. However, because more specificity on a few issues associated with the COCOT lists would assist the parties in meeting their respective compensation mechanism obligations, we now clarify our previous order.

38. Currently, pursuant to a working agreement among APCC and all of the LECs, LECs include the line number, PPO name, and billing address for each payphone on their COCOT list. Although AT&T requests that we expand the information on these lists to include additional data, it does not show that the additional information it seeks is necessary for it to verify its compensation obligation. Moreover, the data sought by AT&T represent valuable and sensitive competitive information that could be used by other payphone providers to gain an undue advantage in the payphone market. Under these circumstances, we decline to mandate the provision of this information. We encourage all of the parties to continue to work together and address possible formatting issues among themselves.[64]

39. We also reject CNS's request that we require LECs to make the COCOT list available to entities other than those required to pay compensation. First, as APCC notes, the widespread dissemination of these lists could increase network fraud. Second, even though the lists would not contain proprietary information, such as payphone location, they nevertheless contain sensitive information including the line number of all competitive payphones. PPOs should not have to share this information with any competitor that seeks it in order to receive payphone compensation. Nevertheless, as CNS argues, IXCs that receive this list for verification purposes should not obtain an unfair advantage in the payphone marketplace. Therefore, we prohibit any IXC that receives this list from using it for any purpose other than verifying its compensation obligation, and we require those IXCs to restrict the availability of that list to personnel performing this function.

40. While we required LECs to provide a list of phones taking COCOT service in their region, this requirement was narrowly tailored to minimize the role of the LECs in the compensation mechanism. We reasoned that LECs do not generally benefit from the use of competitive payphones for interstate access code calling and that it would therefore be inappropriate to adopt a compensation mechanism that imposed significant burdens on them. We continue to believe that LECs should not be unduly burdened in this endeavor and we therefore decline to require LECs to take extraordinary measures to identify competitive payphones in their region that do not subscribe to

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[50] *Second Report and Order* at 3259-60.

[51] AT&T Petition at 3; USTA Petition at 2-3; NTCA Petition at 3.

[52] AT&T Petition at 3.

[53] APCC Comments at 9; Pacific Bell Reply at 2.

[54] USTA Comments at 1.

[55] NTCA Petition at 3.

[56] APCC Comments at 8.

[57] MCI Comments at 8; USTA Petition at 2; Pacific Bell Reply at 2. Pacific Bell subsequently stated that while it does not currently charge for the COCOT list, it reserves its rights to establish an appropriate method of cost recovery for future lists if there were any content or format changes. Letter from Celia Nogales, Federal Regulatory Relations, Pacific Telesis to Donna R. Searcy, Secretary, FCC, February 23, 1993.

[58] Metromedia Comments at 8.

[59] USTA Petition at 2-3.

[60] CNS Petition at 2.

[61] Bell Atlantic Comments at 1-2.

[62] Letter from Albert Kramer, Counsel, APCC to Michael Carowitz, Attorney, Common Carrier Bureau, FCC, March 5, 1993.

[63] *Second Report and Order* at 3259-60.

[64] While some parties have asked that we mandate a format for the COCOT lists, it appears that a number of parties have succeeded in agreeing on a format. Letter from Albert Kramer, Counsel, APCC, to Michael Carowitz, Attorney, Common Carrier Bureau, FCC, March 5, 1993. We therefore see no reason to take action in this area.

COCOT service.[65] We also hold that LECs may recover their reasonable costs in generating and producing these lists through direct charges to entities using them.

41. The *Second Report and Order* required that PPOs whose payphones do not take COCOT service but that seek compensation must submit sufficient verification information to IXCs from which they seek compensation.[66] APCC proposes that a PPO affidavit attesting that the phones for which compensation is claimed are competitive payphones should suffice.[67] We agree. We therefore clarify that a PPO that seeks compensation for payphones that are not included on a LEC COCOT list satisfies its obligation to provide alternative reasonable verification to an IXC if it provides to that IXC a notarized affidavit, signed by the president of the company attesting that each of the payphones for which the PPO seeks compensation is a competitive payphone that was in working order as of the last day of the compensation period.[68]

E. Progress Toward a Per-Call Mechanism

1. Second Report and Order

42. In the *Second Report and Order*, we concluded that it was not feasible to implement a mechanism that would compensate PPOs on a per-call basis. We found both that no entity had the ability to determine accurately the number of access code calls that originate from each competitive payphone, and that no reliable surrogates for this information existed. We directed the Chief, Common Carrier Bureau, to monitor possible progress toward a per-call mechanism.[69]

2. Positions of the Parties

43. APCC argues that IXCs need an incentive to begin moving toward a per-call compensation mechanism and suggests that such incentive could be provided by increasing the $6 compensation rate by 10% per quarter to reflect probable increases in dial-around calling.[70] MCI opposes APCC's petition, arguing that APCC attempts to shift to the IXCs the burden of establishing a per-call compensation mechanism when it should be the responsibility of the PPOs to develop a call-tracking ability.[71] MCI argues further that APCC does not support its claim that an escalation of the compensation amount by 10% per quarter is necessary to offset an increase in dial-around calling.[72]

44. LDDS argues that the PPOs demanding compensation should implement a call-tracking capability to generate the data necessary for a per-call mechanism.[73] LiTel supports LDDS and proposes reducing the $6 compensation rate to provide PPOs an incentive to implement such a call-tracking capability.[74]

3. Discussion

45. We continue to believe that a per-call compensation mechanism is preferable to a flat fee per-phone. However, we cannot conclude that a per call mechanism can be implemented at this time. We direct the Common Carrier Bureau to continue monitoring progress in this area and work with the industry to explore ways of moving to a per-call mechanism. If and when appropriate, we will initiate a new proceeding to this end.

46. We decline to adopt APCC's proposal to increase the compensation amount incrementally to provide an incentive to the OSPs to cooperate in the establishment of a per-call compensation mechanism.[75] We expect cooperation from all parties in working towards establishing a per-call compensation mechanism. We do not believe that it is necessary to adopt APCC's proposal to achieve this end. In addition, there is no basis in the record for assuming that access code calling will increase 10% each quarter as

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[65] If, however, LECs can identify such phones without undue burden based on other readily available information, LECs must do so.

[66] *Second Report and Order* at 3259-60. For example, according to the Iowa Telephone Association, competitive payphones use regular business lines in Iowa because COCOT service is not available in that state. Letter from Kent Jerome, Iowa Telephone Association to Cheryl Tritt, Chief, Common Carrier Bureau, FCC, September 11, 1992.

[67] Letter from Albert Kramer, Counsel, APCC to Michael Carowitz, Attorney, Common Carrier Bureau, FCC, March 5, 1993.

[68] APCC claims that some of the early LEC COCOT lists omitted certain competitive payphone automatic number identifications (ANIs) that should have been included. APCC states that LECs have corrected these omissions prospectively, but that PPOs have not yet received compensation for payphone ANIs erroneously excluded from the lists. Letter from Albert Kramer, Counsel, APCC, to Michael Carowitz, Attorney, Common Carrier Bureau, FCC, March 19, 1993. Pacific Bell states that it can readily identify competitive payphone ANIs omitted from past lists by searching its service orders, billing system, billing revenue system, and usage reports for each ANI. If the ANI appears in one of these four areas, Pacific Bell notifies the IXC or clearinghouse that the ANI is entitled to compensation for the period in question. Letter from Celia Nogales, Federal Regulatory Relations, Pacific Telesis, to Donna Searcy, Secretary, FCC, April 7, 1993. We believe that upon receipt of specific requests by PPOs to search for particular ANIs, all LECs should be able to use these or other reasonable and unburdensome procedures to correct retrospectively any remaining errors in the COCOT lists, and we direct them to do so. IXCs should accept these retrospective adjustments and provide past due compensation accordingly.

[69] *Second Report and Order* at 3252-53. At that time, we also denied a motion by APCC which asked us to require: (1) LECs to submit detailed data on the usage patterns and compensation levels for LEC payphones; and (2) LECs and OSPs to submit specific information on their capabilities for measuring and tracking 800, 950, and 10XXX traffic. APCC now argues that we should reconsider its motion. APCC Petition at 12. MCI and Pacific Bell argue that APCC's motion was properly rejected previously. MCI Comments at 5; Pacific Bell Comments at 3. As we noted in the *Second Report and Order*, APCC has not demonstrated that the substantial information that it seeks from LECs and OSPs is necessary for the disposition of the issues in this proceeding. *Second Report and Order* at 3253, n.22. Should the Common Carrier Bureau deem it necessary or appropriate to seek further information in the future from the LECs and/or the OSPs, it may do so. Accordingly, we deny reconsideration of our disposition of APCC's Motion for Collection of Information.

[70] APCC Petition at 13.

[71] MCI Comments at 6-7. In reply, APCC argues that even with station message detail recording (SMDR) capability for all competitive payphones, PPOs would not be able to bring about a per-call mechanism. APCC Reply at 7.

[72] MCI Comments 6.

[73] LDDS Petition at 5-6.

[74] LiTel Comments at 8, n.25.

[75] APCC Petition at 13.

APCC claims. For similar reasons, we also reject LiTel's proposal to reduce the compensation amount to provide an incentive to PPOs to implement a call-tracking capability.

F. Allnet's Application for Review

1. Background

47. On June 17, 1992, Allnet filed with the Commission a request that it be removed from the list of IXCs required by the *Second Report and Order* to pay compensation to PPOs. Allnet argued that it should not be required to pay compensation because it (1) did not provide "operator services" as defined by Commission rules and TOCSIA, and (2) it did not have adequate notice that it might fall within the scope of these compensation provisions.[76] Allnet also argued that LECs should be included among the IXCs required to pay compensation to PPOs.[77]

48. On August 14, 1992, the Common Carrier Bureau rejected Allnet's arguments that it should not be required to pay compensation.[78] The Bureau also found that Allnet's argument that LECs be included in the compensation mechanism should have been raised in a procedure that allowed for formal notice and comment.[79]

2. The Application for Review

49. On September 4, 1992, Allnet filed an Application for Review ("Application") of the Bureau Decision. In the Application, Allnet argues that the Bureau Decision was erroneous, procedurally defective, ultra vires, and in conflict with Commission rules and the Communications Act.[80] Allnet argues that the Bureau Decision provides no reasons for including Allnet on the list of IXCs required to pay compensation and excluding other entities that provide operator services, such as LECs.[81] Allnet further argues that because the list of those IXCs obligated to pay compensation was the outcome of a Commission rulemaking, only the Commission, not the Bureau, could revise the list.[82]

50. Allnet argues in addition that the Bureau Decision is inconsistent with Commission rules and the Communications Act, because the Bureau confuses statutory analysis in one section of the *Second Report and Order* with the definition of "operator services" in TOCSIA, the *Further Notice*, and the *Second Report and Order*.

51. Bell Atlantic, USTA, and APCC oppose the Application.[83] Bell Atlantic argues that the Commission should deny the Application to the extent that it requests the Commission to include LECs among the entities required to pay compensation, because LECs typically do not receive dial-around traffic.[84] USTA argues that because PPOs and LECs are competitors in the payphone market, LECs should not be required to pay compensation to PPOs.[85] Bell Atlantic and APCC argue that the Application was untimely and did not meet the requirements of a petition for reconsideration.[86]

3. Discussion

52. We now conclude that the Bureau acted properly and within the scope of its authority in responding to the Request. Therefore, we deny Allnet's Application for Review.

53. First, the Bureau was correct in concluding that Allnet's argument that LECs be included among those required to pay compensation should have been the subject of a petition for reconsideration. The rules specifically limited compensation obligations to IXCs, and prior to Allnet's June 17th request to the Bureau, no party had suggested that LECs be included among the IXCs required to pay compensation to PPOs.[87] The matter was never considered in this proceeding. Consequently, if Allnet wished to raise the issue before the Commission, it should have filed a petition for reconsideration of the *Second Report and Order*, and not have filed an application for review of the Bureau's implementation of the rules. Therefore, we deny its Application on this point.

54. Second, contrary to Allnet's arguments, the Bureau was given explicit authority to maintain the list of IXCs required to pay compensation and to make adjustments to that list in accordance with the criteria set forth in the *Second Report and Order:*

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[76] Allnet's argument that it is not a provider of "operator services," as defined by TOCSIA, assumes the application of a statutory exclusion from the provision defining "operator service" as:

> any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of any interstate telephone call[.]

The statutory exclusion removes from this definition any calls that are billed or completed by:

> (A) automatic completion with billing to the telephone from which the call originated; or (B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

47 U.S.C. Section 226(a)(7).

[77] Letter from Roy Morris, Director and Deputy General Counsel, Allnet to Donna R. Searcy, Secretary, FCC, June 17, 1992 ("Request").

[78] Letter from Cheryl Tritt, Chief, Common Carrier Bureau, FCC to Roy Morris, Director and Deputy General Counsel, Allnet, August 14, 1992 ("Bureau Decision").

[79] *Id.* at 3.

[80] Application at 1.

[81] *Id.* at 3.

[82] *Id.* at 4.

[83] Bell Atlantic Opposition to Application at 1; USTA Opposition to Application at 1; APCC Opposition to Application at 1.

[84] Bell Atlantic Opposition to Application at 1.

[85] USTA Opposition to Application at 2.

[86] Bell Atlantic Opposition to Application at 1-2; APCC Opposition to Application at 2.

[87] *See* Bureau Decision at 3; *Second Report and Order* at 3259.

> Compensation obligations shall be adjusted periodically if the operational status of any eligible IXC changes or in accordance with revised toll revenue data. In either such event, the Common Carrier Bureau shall issue a public notice showing revised compensation obligations.[88]

The Bureau correctly concluded that Allnet met the criteria for paying payphone compensation, and it acted properly and within the authority delegated to it in so concluding.

55. Third, the Bureau correctly disposed of Allnet's claims that it is not an operator service provider for payphone compensation purposes. As the Bureau noted, Allnet's argument assumes the application of certain exclusions in TOCSIA's definition of operator services that the *Second Report and Order* specifically held to be inapplicable in the payphone compensation context.[89] We therefore deny Allnet's Application on this point as well.

G. Further Final Regulatory Flexibility Analysis

56. Need and purpose of this action. We have prescribed an interim compensation rate of $6 per payphone per month for PPOs for originating interstate access code calls from their payphones. The compensation rate is designed to promote the Commission's regulatory reform initiatives by encouraging investment in the competitive payphone market.

57. Summary of issues raised by public comments in response to the Initial Regulatory Flexibility Analysis. There were no comments filed on the Further Initial Regulatory Flexibility Analysis.[90]

58. Significant alternatives considered and rejected. In this proceeding, we received extensive comments on the issues. After carefully weighing all aspects of the issues and comments in this proceeding, we have taken the most reasonable course of action pursuant to the TOCSIA, while simultaneously minimizing regulations that would impose undue economic burdens on small entities.

59. In considering the method by which compensation would be computed, we concluded that compensation for interstate access code calls should be paid to PPOs on a per-phone, rather than a per-call basis. We found that while per-call compensation would create greater incentives for PPOs to place payphones in locations that generate the most interstate traffic, it is not yet feasible to implement per-call compensation since no entity currently has the ability to determine accurately the number of access code calls that originate from competitive payphones.

60. We identified three reasonable approaches to establish a range of reasonable compensation rates. We examined: (1) the access charge compensation that a local exchange carrier (LEC) receives for its regulated provision of payphones; (2) the level of LEC 0- transfer service charges; and (3) AT&T 0+ commission levels. These three approaches yielded compensation rates in the range of $5.25 to $6.87 per payphone per month, and we decided on a rate of $6 to be consistent with all three approaches.

61. Additionally, to facilitate compensation and minimize administrative burdens, we concluded that only those interexchange carriers (IXCs) who earn annual toll revenues in excess of $100 million and that provide operator services would be required to provide compensation to PPOs. We have also permitted IXCs that attest that they do not receive interstate access code calls from payphones to which they are not presubscribed to avoid the obligation to pay compensation. To further minimize burdens, we required the LECs to submit to each participating IXC a list of all phones taking COCOT service in each LEC's region. The list will permit IXCs to verify that a payphone exists in working order and is owned by the PPO submitting a bill.

62. The actions that we took in the *Second Report and Order*, and the modifications herein, do not have a significant economic impact on small business entities. The only mandatory obligations fall on two types of entities, neither of which are small businesses: (1) IXCs with annual toll revenues exceeding $100 million and that provide operator services, and (2) LECs. IXCs with annual toll revenues exceeding $100 million are not small business entities under the Regulatory Flexibility Act. LECs are independently owned and operated, are dominant in their field, and also do not qualify as small businesses under the Regulatory Flexibility Act.[91] In addition, even though LECs are not subject to the Act, the requirement that LECs submit lists to IXCs of phones taking COCOT service was narrowly tailored with the express purpose of minimizing the role of the LECs in the compensation mechanism.

IV. CONCLUSION

63. We affirm certain aspects of the *Second Report and Order* and make a number of modifications. First, we affirm our holding that IXCs must pay PPOs compensation in the amount of $6 per month per payphone. Second, we modify the *Second Report and Order* to allow IXCs to avoid the obligation to pay compensation if they do not receive access code calls from payphones to which they are not presubscribed. Third, we affirm our decision to use a toll revenue standard for apportioning compensation among those IXCs required to pay. Fourth, we clarify in a number of respects our requirements pertaining to the COCOT lists provided by LECs to IXCs. Finally, we deny Allnet's Application for Review of a decision by the Common Carrier Bureau relating to the list of IXCs required to pay compensation.

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[88] *Second Report and Order* at 3259, n.84.

[89] As the Bureau stated, "The *Order* explained that the exclusions incorporated into TOCSIA's definition of "operator services" applied instead to the notification requirements placed on OSPs by Section 226(b), and served to limit those requirements to situations in which they were necessary. The *Order* concluded that these exclusions were illogical in the context of the payphone compensation provisions of TOCSIA and that Congress could not have intended for them to apply to these provisions since that would completely negate the legislative purpose in enacting the payphone compensation provisions[.]" Bureau Decision at 2. We agree with the Bureau's analysis.

[90] The Regulatory Flexibility Act of 1980 is intended to provide small business entities with greater opportunity to participate in rulemaking actions which affect them. 5 U.S.C. Sections 601-612.

[91] 13 U.S.C. Section 632(a). The Commission found all exchange carriers to be dominant in the *Competitive Carrier* proceeding. 85 FCC 2d 1, 23-24 (1980).

V. ORDERING CLAUSES

64. Accordingly, pursuant to authority contained in sections 1, 4, 201-205, and 226 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154, 201-205, and 226, IT IS ORDERED that the policies, rules, and requirements set forth herein are ADOPTED.

65. IT IS FURTHER ORDERED that the petitions for reconsideration of the *Second Report and Order* are DENIED in part and GRANTED in part, as described herein.

66. IT IS FURTHER ORDERED that the provisions in this *Memorandum Opinion and Order* will be effective immediately upon its release.[92]

67. IT IS FURTHER ORDERED that the Application for Review filed by Allnet is DENIED.

68. IT IS ORDERED that the Final Further Regulatory Flexibility Analysis described herein be adopted.

69. IT IS FURTHER ORDERED that the Secretary shall cause a copy of this Order to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. Section 603(a) (1981). The Secretary shall also cause a copy of this Order to appear in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

LIST OF PARTIES PARTICIPATING IN THIS PROCEEDING

Allnet Communications Services, Inc. (Allnet): Reply

American Public Commun. Council: Petition, Comments, Reply

American Telephone & Telegraph Company (AT&T): Petition, Comments, Reply

Bell Atlantic Telephone Companies (Bell Atlantic): Comments

Capital Network Systems (CNS): Petition, Reply

International Telecharge, Inc. (ITI): Petition, Reply

LDDS Communications, Inc. (LDDS): Petition

LiTel Telecommunications Corporation: Support

MCI Telecommunication Corporation (MCI): Comments

Metromedia Communications Corporation: Comments

National Telephone Cooperative Association (NTCA): Petition

Pacific Bell and Nevada Bell (Pacific Bell): Comments, Reply

United States Telephone Association (USTA): Petition, Comments

Williams Telecomm. Group, Inc. (WilTel): Petition

[92] The publication of a rule may be made less than 30 days from publication in the Federal Register where good cause exists. *See* 5 U.S.C. Section 553 (d)(3). In order to avoid unduly delaying the modifications to the *Second Report and Order* made herein, we find good cause to make this order effective upon release.

APPENDIX B

AMENDMENT TO THE CODE OF FEDERAL REGULATIONS

Title 47 of the CFR, Part 64, is amended as follows:

PART 64 -- MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for Part 64 continues to read:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201-4, 218, 225, 226, 227, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201-4, 218, 225, 226, 227 unless otherwise noted.

2. Section 64.1301 is amended by revising paragraph (b) and adding paragraph (f) to read as follows:

Subpart M -- Competitive Payphone Compensation

Section 64.1301 Competitive payphone compensation.

(a) Each competitive payphone shall be eligible for compensation in the amount of $6 per payphone per month for originating interstate access code calls. "Competitive payphones" are those pay telephones not owned or controlled by the local exchange carriers (LECs) or AT&T.

(b) This compensation shall be paid by interexchange carriers (IXCs) that both: (i) earn annual toll revenues in excess of $100 million, as reported in the FCC staff report entitled "Long Distance Market Shares;" and (ii) provide live or automated operator services. Notwithstanding this provision, an IXC need not pay compensation if, within 30 days after public notice of the Long Distance Market Shares report, it files with the Chief, Common Carrier Bureau, a notarized affidavit stating that the IXC does not receive end user-initiated access code calls from payphones on which it is not the presubscribed carrier. The affidavit must be signed by the corporate officer with principal responsibility for operator service operations of the IXC. Each individual IXC's compensation obligation shall be set in accordance with its relative share of toll revenues among IXCs required to pay compensation. For example, if total toll revenues of IXCs required to pay compensation is $50 billion, and one of these IXCs earned $5 billion in total toll revenues, the IXC must pay $.60 per payphone per month.

(c) Initial compensation obligations are set forth in Appendix B of the Commission's Second Report and Order in CC Docket No. 91-35, FCC No. 92-170, released May 8, 1992. Compensation obligations shall be adjusted periodically if the operational status of any eligible IXC changes or in accordance with revised toll revenue data. In either such event, the Common Carrier Bureau shall issue a public notice showing the revised compensation obligations. These revised obligations shall become effective on the date specified in the public notice.

(d) IXCs obligated to pay compensation and competitive payphone owners are responsible for establishing their own billing or payment arrangements.

(e) LECs shall provide IXCs paying compensation under Section (b) and (c) above with a list each quarter of all telephone lines receiving customer-owned coin-operated telephone (COCOT) service in the LEC's region as of the date the list was generated.

(f) A competitive payphone owner (PPO) that seeks compensation for competitive payphones that are not included on a LEC COCOT list satisfies its obligation to provide alternative reasonable verification to an IXC if it provides to that IXC a notarized affidavit, signed by the president of the company, attesting that each of the payphones for which the PPO seeks compensation is a competitive payphone that was in working order as of the last day of the compensation period.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-314
ET Docket No. 92-100

In the Matter of

Amendment of the Commission's	RM-7617, RM-7760,
Rules to Establish New	RM-7782, RM-7860,
Narrowband Personal	RM-7977, RM-7978,
Communications Services	RM-7979, RM-7980,
	PP-4, PP-5, PP-11, PP-14, PP-35 through PP-40, PP-53, PP-69, PP-79 through PP-85

FIRST REPORT AND ORDER

Adopted: June 24, 1993; Released: July 23, 1993

By the Commission: Commissioner Barrett issuing a statement.

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INTRODUCTION

1. By this action, the Commission provides for operation of new, narrowband personal communications services (PCS) on spectrum in the 900 MHz band.[1] Such new services are expected to include advanced voice paging, two-way acknowledgement paging, data messaging, and both one-way and two-way messaging and facsimile. The regulatory plan we are adopting for narrowband PCS includes an allocation of spectrum, a flexible regulatory structure, and technical and operational rules. Issues regarding licensee selection procedures and the regulatory status of the service are the subject of legislation actively being considered by the Congress and will be addressed by the Commission in a further action. The narrowband PCS services authorized under these rules are expected to increase the productivity of businesses, result in significant opportunities for small business participation, make available to the public new services to enhance their communications, and assist American industry to maintain its leadership position in the global telecommunications marketplace.

BACKGROUND

2. The Commission initiated the PCS proceeding with a *Notice of Inquiry* in 1990.[2] The Commission subsequently issued a *Policy Statement* on PCS and has held an *en banc* hearing to address the issues raised in this proceeding.[3]

3. On July 16, 1992, the Commission adopted a *Notice of Proposed Rule Making and Tentative Decision* (*Notice*) in which it addressed both narrowband PCS services at 900 MHz and PCS at 2 GHz.[4] In the *Notice*, the Commission enumerated the following four goals: 1) universality of

[1] This proceeding also addresses PCS operations at 2 GHz. Since many of the technical and regulatory issues involved in narrowband PCS are different from PCS at 2 GHz, and in view of the fact that the spectrum proposed for narrowband PCS services is free of incumbent licensees and the matters associated with such incumbent users, we are addressing narrowband PCS at 900 MHz separately from PCS at 2 GHz. We will address PCS at 2 GHz in the near future. Because of the differences, we note that the issues and decisions herein, for example those on licensee eligibility and service area, are not intended to signal, and will not necessarily be reflected in, our decisions on 2 GHz PCS.

[2] *See Notice of Inquiry*, GEN Docket No. 90-314, 5 FCC Rcd 3995 (1990).

[3] *See Policy Statement and Order*, GEN Docket No. 90-314, 6 FCC Rcd 6601 (1991). An *en banc* hearing on PCS was held on December 5, 1991.

[4] *See Notice of Proposed Rule Making and Tentative Decision*,

service availability; 2) speed of deployment; 3) diversity of services; and 4) competitive delivery. It stated that these four goals should be optimized and balanced in providing spectrum and a regulatory structure for PCS.[5] The Commission noted that the 900 MHz proposals include a variety of narrowband PCS services such as advanced paging, messaging, and advanced cordless telephones. These services include one-way systems with relatively low power transmissions from a subscriber to a base station, one-way systems with relatively high power transmissions from a base station to a subscriber, and one-way services that include facsimile, graphics and other imaging services. Also proposed are two-way services that would provide subscribers with more diverse messaging than is currently available, including for example, tracking and acknowledgement. In addition, two-way advanced cordless telephone services were proposed.

4. In view of the wide diversity of proposed services, the Commission proposed to define PCS broadly. Specifically, the Commission proposed to define PCS as a family of mobile or portable radio services which could provide services to individuals and business, and be integrated with a variety of competing networks. An allocation of spectrum for narrowband PCS was proposed at 901-902, 930-931 and 940-941 MHz. Comment also was requested on various combinations of four licensed service area options: 1) 487 Basic Trading Areas (BTAs); 2) 47 Major Trading Areas (MTAs); 3) 194 Local Access and Transport Areas (LATAs); and, 4) nationwide.

5. The *Notice* included proposals for technical requirements, such as emission limits and frequency stability. The item proposed to pair blocks of spectrum from the 901-902 and 940-941 MHz bands and to provide for unpaired use in the 930-931 MHz band. Comment was sought on three alternative channeling plans providing both paired and unpaired channels and on the amount of spectrum that should be provided for each configuration.

6. In the tentative decision portion of the *Notice*, the Commission proposed to award a pioneer's preference to Mtel for development of innovative new technology that will increase spectrum efficiency.[6] This tentative decision was based on Mtel's having developed and tested "Multi-Carrier Modulation" technology that is capable of transmitting a 24 kbps nationwide simulcast signal in a single 50 kHz channel and designing a complete advanced messaging system based upon this efficient technology.

DISCUSSION

Service Definition and Spectrum Matters

7. *Narrowband PCS Demand.* In the *Notice*, the Commission recognized the increasing demand for PCS services, including those narrowband PCS services that can be reasonably and efficiently provided using spectrum available at 900 MHz. In response to the *Notice*, the commenting parties confirm this demand for narrowband PCS. Several commenters also submitted a number of market projections indicating substantial demand for narrowband PCS services. Specifically, Arthur D. Little, Inc. (Arthur D. Little) estimates future demand for enhanced paging/messaging services would be 15 million units in 1995, 17.5 million units in 1998, and 21.3 million units in 2002.[7] Telocator states that the 1991 market for paging services is 11.2 million subscribers (4.5% penetration of total market) and forecasts that the market for paging and advanced paging services will grow to 16.7 million subscribers in 1997 (6.3% penetration) and 22.99 million subscribers (8.13% penetration) in 2002, if licensing is complete in 1994. Similarly, PageNet states that advanced voice paging, its proposed narrowband PCS service, has an immediate consumer demand of at least 18 million people nationwide. Another paging concern, Dial Page states that four million current paging users and an additional four million new paging users would subscribe to a type of narrowband PCS it (refers to as Acknowledgement Paging (AP). Mtel submits another Arthur D. Little study concluding that demand for its nationwide wireless network (NWN) approaches one million subscribers that would increase to nearly ten million after ten years of service, assuming service in 300 markets.[8]

8. Based on the record in this proceeding, we continue to believe that there is a significant and growing demand for narrowband PCS services. We find that the establishment of narrowband PCS is warranted and that the public interest would be served through the provision of new and innovative narrowband PCS services to meet consumers' demands and needs for mobile and portable communications services.

9. *Narrowband PCS Service Definition.* In the *Notice*, we proposed to define PCS broadly as a family of mobile and portable radio communications services which could provide services to individuals and business, and be integrated with a variety of competing networks. We proposed that broadcasting[9] be excluded from PCS spectrum and that fixed services generally be permitted only if reasonably ancillary to mobile PCS services.

10. Commenting parties interested in providing services in the 900 MHz range provided a number of examples of services that fit within this definition. The most commonly

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GEN Docket No. 90-314 and ET Docket No. 92-100, 7 FCC Rcd 5676 (1992); *Erratum*, 7 FCC Rcd 5779 (1992). The narrowband aspects of the *Notice* were in response to ten petitions for rule making that requested allocation of spectrum for new paging and messaging services. The petitions were filed by: 1) Telocator on January 23, 1991 (RM-7617); 2) Montauk Telecommunications Company (Montauk) on June 6, 1991 (RM-7760); 3) Echo Group L.P. (Echo) on July 30, 1991 (RM-7782); 4) PacTel Paging (PacTel) on August 2, 1991 (advanced architecture paging, RM-7979); 5) Dial Page, L.P. (Dial Page) on October 11, 1991 (RM-7977); 6) PacTel on October 15, 1991 (ground-to-air paging, RM-7860); 7) Mobile Telecommunication Technologies Corporation (Mtel) on November 12, 1991 (RM-7978); 8) PageMart, Inc. (PageMart) on March 3, 1992 (RM-7980); 9) Skycell Corporation (Skycell) on May 29, 1992; and, 10) Paging Network, Inc. (PageNet) on June 1, 1992.

[5] *See Notice, supra*, at para. 6.

[6] *See Notice* at paras. 149-151.

[7] Arthur D. Little's filing to December 5, 1991 *en banc* hearing on PCS at 17, GEN Docket No. 90-314.

[8] Mtel Reply, Tab 2, Arthur D. Little's "Quantitative Demand Assessment for NWN Services" at 9.

[9] As broadcasting is defined at Section 3(o) of the Communications Act of 1934, as amended, 47 U.S.C. § 153(o).

cited services are advanced paging and messaging services. Both of these services go beyond simply alerting the subscriber that a call or message is waiting, and allow the subscriber to respond and interact with the page or message. Motorola Inc. (Motorola) states that advanced messaging services are a major subgroup of narrowband services and will permit the provision of services such as electronic mail (E-mail) and the transmission of voice messages and graphic images.[10] PacTel states that full two-way services (such as two-way data) and limited two-way data (such as acknowledgement paging) should be provided for within the narrowband PCS concept and that a variety of advanced messaging services can be offered in 25 kHz channels. American Paging, Inc. (American Paging) discusses one and two-way messaging communications to deliver enhanced character sets, high/low resolution graphics, video, E-mail, facsimile, digitized voice, and a range of data products.[11] PageNet agrees that narrowband PCS should be defined as mobile or portable paging services including, but not limited to, data, advanced paging and messaging services.

11. Many parties argue that narrowband PCS should be restricted to some type of advanced paging or messaging, or that some type of limitation of use be imposed. A number of parties argue that due to the limited amount of spectrum available, narrowband 900 MHz PCS services should be more limited than broadly-defined PCS at higher frequencies. American Paging proposes that two-way voice communications such as advanced cordless telephone operations be prohibited. Motorola proposes that the entire allocation be dedicated exclusively for new advanced messaging and data services. Utilities Telecommunications Council (UTC) requests that some 900 MHz spectrum be allocated exclusively for non-commercial, internal use by traditional private radio eligibles. Grand Broadcasting Corporation (Grand Broadcasting) proposes that one megahertz be allocated solely for a mobile interactive broadcast radio service (IBRS). In-Flight Phone Corporation (In-Flight) requests that at least one nationwide 500 kHz block be allocated solely for audio broadcast retransmissions to airline passengers. Corporate Technology Partners (CTP) requests that 100 kHz control channels be allocated in the 930-931 and 940-941 MHz bands so that its Personal Communications Interface (PCI) can share frequencies between 930-960 MHz on a secondary basis, which would allow PCI/CT2 Plus roaming between the United States and Canada. Finally, American Petroleum Institute (API) proposes that 375 kHz be dedicated for emergency response communications for industrial/land transportation eligibles.

12. In reply comments, Motorola opposes the limitations proposed by CTP, In-Flight, and API. Motorola argues that the spectrum requirements of CTP's CT-2 services are significantly greater than other narrowband services and, consequently, that those services would be more appropriate in higher bands; that In-Flight's service is more similar to broadcast than personal messaging and would consume too much spectrum for each provider; and that API's proposal constitutes a conventional land mobile radio service already authorized in other spectrum. PageNet also opposes CTP, In-Flight and API's proposals, arguing that the allocation should be limited to advanced paging. Telocator agrees, stating that the spectrum should be used only for advanced messaging type services, and not for the uses suggested by API, CTP, and In-Flight. Telocator also opposes UTC's proposal to reserve a third of the allocation for non-commercial internal use by traditional private radio eligibles.

13. We continue to believe that a broad definition of PCS is warranted. We find that our concept of PCS as family of services is appropriate and will permit PCS to encompass a wide array of mobile, portable and ancillary communication services to individuals and businesses, and be integrated with a variety of competing networks. We find that narrowband PCS is an important first member of the PCS service family, and are adopting the rules proposed in the *Notice* for the definition of PCS and for permissible communications with minor editorial changes. We decline to adopt the suggestions of some commenters to limit narrowband PCS to advanced paging and messaging services. While we anticipate, given the stated interest in such services, that advanced messaging and paging services will be one of the predominant narrowband PCS services to be provided, at the same time, we do not wish to foreclose other potential narrowband services.

14. Further, we decline to allocate spectrum specifically for an advanced cordless telephone service, inasmuch as already we have permitted cordless telephones to operate in a number of frequency bands, including 902-928 MHz,[12] and have under consideration a petition for additional frequencies in a different band.[13] Additionally, no set-aside for non-commercial use by traditional private radio eligibles, as proposed by UTC, will be made because we are not convinced that spectrum currently allocated for such private land mobile services is inadequate and because, in general, the services suggested by UTC appear to be within the definition of narrowband PCS and permissible in this spectrum. As there is no petition for rule making before us requesting that spectrum sharing in the 930-960 MHz band be permitted, we will not reserve spectrum for control channels in the narrowband PCS spectrum. Finally, we are adopting the restriction that the spectrum allocated for narrowband PCS not be used for broadcasting.

15. *Spectrum Allocation/Channelization Plan.* In the *Notice* we proposed to allocate 3 megahertz of spectrum at 901-902, 930-931, and 940-941 MHz to narrowband PCS. Specifically, we proposed to pair blocks of spectrum from the 901-902 and 940-941 MHz bands, and to provide for unpaired use in the 930-931 MHz band. Three alternative channelization plans were presented: twenty 50 kHz symmetrically paired blocks and twenty 50 kHz unpaired blocks; four 250 kHz symmetrically paired blocks and four 250 kHz unpaired blocks; and two 500 kHz symmetrically

[10] Motorola envisions that in advanced messaging service, an outbound message to an individual involves five actions: 1) simulcast address; 2) unit acknowledges address with no frequency re-use; 3) message transmitted in local area with re-use; 4) unit acknowledges message data with re-use; and 5) steps 3 and 4 repeated if necessary due to errors. Likewise the inbound message initiated by an individual requires 5 actions: 1) inbound channel request with re-use; 2) outbound grant/assignment with re-use; 3) inbound message transmission; 4) outbound confirmation with re-use; and 5) 3 and 4 repeated if necessary due to errors. See Motorola Ex Parte Filing of October 6, 1992.

[11] *See* American Paging at 3.

[12] *See* 47 C.F.R. §§ 15.233, 15.247, and 15.249.

[13] *See* Petition for Rule Making filed by the Telecommunications Industry Association on August 20, 1992, RM-8094.

paired blocks and a 1 MHz unpaired block. Comment was requested on our proposals to provide both paired and unpaired spectrum and on the amount of spectrum that should be provided for each configuration.

16. There was no clear consensus on channelization. Although most commenters believe that the majority of channels should have bandwidths of 50 kHz or less, a number of commenters suggest that the channeling plan for narrowband PCS should accommodate both paired and unpaired operation and a number of varying channel bandwidths. There was general agreement among the commenters, however, that the 901-902 MHz band should be used for low power "talk-in" (mobile-to-base) operations.[14] Motorola, for example, states that commenters have recognized the potential engineering and cost benefits of reserving the 901-902 MHz band exclusively for low power talk-in channels. Additionally, many of the parties support providing for some asymmetrically paired blocks (a mobile-to-base block of smaller bandwidth than the base-to-mobile block). These parties state that asymmetrical channeling is spectrally efficient since the response requirement uses less bandwidth than that needed for the message being communicated.

17. American Paging, Arch Communications Group, Inc. (Arch), The Ericsson Corporation (Ericsson), and Mtel support channel bandwidths of 50 kHz or less. Mtel states that no proven efficiencies would result from specifying blocks larger than 50 kHz, and that creating larger channel blocks would restrict entry opportunities and limit competition and diversity. PacTel states that large channel blocks such as 200 kHz are unnecessary and would result in "warehousing" of spectrum by applicants that can provide their service with less.

18. PageMart, PacTel, and Motorola each propose alternate channeling plans. Each of these plans would limit the 901-902 MHz band to low power transmissions and would provide for both symmetrical and asymmetrical channel pairings. All of the proposed channeling plans include some unpaired channels in 901-902 MHz to provide low-power response capability for existing paging licensees. In particular, PageMart proposes: five 200 kHz blocks, each associated with two 25 kHz blocks; five 25 kHz symmetrically paired blocks; ten 25 kHz blocks paired with 12.5 kHz blocks; ten 50 kHz unpaired blocks; and fifty 12.5 kHz unpaired blocks. PacTel proposes five 100 kHz symmetrically paired blocks; twenty-two 20 kHz blocks paired with ten 100 kHz blocks, eight 50 kHz blocks, and four 25 kHz blocks; and three 20 kHz unpaired blocks. Motorola proposes three 150 kHz symmetrically paired blocks; thirty-one 50 kHz blocks paired with 12.5 kHz blocks; and thirteen 12.5 kHz unpaired blocks for use by existing paging providers. Additionally, Motorola suggests that we allow licensees the flexibility to combine or split channels as long as they stay within their authorized spectrum.

19. We believe that the channelization plan for narrowband PCS should provide a flexible framework that will foster our goals of universality, speed of deployment, diversity of services and competitive delivery. Potential PCS providers propose a diverse range of services with varying channel bandwidth requirements. We find that a mix of paired, unpaired and varying bandwidths will provide the most flexible solution for meeting the stated needs of narrowband PCS providers. At the same time, we have reconsidered our original proposal to channelize and license the entire 3 MHz of available 900 MHz spectrum at this time. We now believe that less spectrum is sufficient to support the narrowband PCS proposals before us. Further, given the diversity in channel bandwidths and other operational considerations associated with these proposals, this approach will allow us to respond to growth and development of specific narrowband PCS services as well as potential new future services. In view of the above considerations, we are allocating the 901-902, 930-931 and 940-941 MHz bands to narrowband PCS. However, at this time we will only channelize and license two of the three megahertz of spectrum we are making available for 900 MHz PCS use. We believe this will provide an adequate amount of spectrum for the initiation of narrowband PCS and allow us flexibility in the future to channelize and license the remaining one megahertz of spectrum as this service develops.

20. Based on the record, it appears that most proposed narrowband services can be accommodated within a 50 kHz channelization plan. It also appears that the vast majority of narrowband PCS services propose low-power return path response capability. In this regard, we agree with the commenting parties that the 901-902 MHz band is particularly suited to use for low-power operations and that asymmetrical channel bandwidth pairings should be used to promote spectrum efficiency. As noted by Motorola and others, the communications requirements of response operations are substantially less than those of base-to-mobile operations. Therefore, our channelization plan will provide twelve 50 kHz channels in the 930-931 MHz band asymmetrically paired with twelve 12.5 kHz channels in the 901-902 MHz band. We also concur with those commenters that suggest that some response channels be provided for use by existing licensees. This will permit existing paging operations to be upgraded and provide some acknowledgement and messaging capability. We will therefore provide eight 12.5 kHz channels for use by existing common carrier and private paging licensees. To accommodate unpaired 50 kHz operations, we are providing five unpaired channels. To accommodate uses that require symmetrical pairings, we are providing nine 50 kHz channel pairs (*i.e.*, 50 kHz paired with 50 kHz).

21. Finally, we will permit the aggregation of channels in any of the paired or unpaired channel groups (*e.g.*, up to 150 kHz paired with 150 kHz) to accommodate the wider bandwidth services. We believe that such an aggregation approach will permit the wider bandwidth proposals suggested by PacTel and Motorola, yet ensure that the spectrum resource is used in an efficient manner.[15] Further,

[14] Parties generally pointed out that both the 930-931 and 940-941 MHz bands are adjacent to high power operations that would make such a low power "talk-back" operation more difficult. *See*, for example, Motorola at 19; PacTel Paging Reply at 10; PageMart Reply at 18.

[15] We expect that under this approach PCS service providers will aggregate only the number of channels necessary to provide the quality and level of service desired. Accordingly, if service providers require 100 kHz channels for data but only 25 kHz for response they could aggregate two 50/12.5 kHz channels. If they require 150 kHz for data and response, they would be able to aggregate up to three 50 kHz symmetrically paired channels.

our technical rules will permit sufficient flexibility for licensees to use different modulations and other technical characteristics as suggested by Motorola.

22. *Licensed Service Areas.* In the *Notice*, the Commission stated that large regional or nationwide licensed service areas would provide for flexibility in the design and implementation of 900 MHz narrowband PCS systems.[16] The Commission also noted that 900 MHz petitioners generally proposed either regional or nationwide services. The Commission tentatively concluded that PCS licensed service areas should be larger than those initially licensed in cellular; and requested comment on four options: 1) 487 BTAs plus Puerto Rico;[17] 2) 47 MTAs with Alaska separated from the Seattle MTA, plus Puerto Rico;[18] 3) 194 LATAs; and 4) nationwide.

23. Most of the commenting parties support a combination of nationwide and regional licensed service areas for narrowband 900 MHz PCS services. For example, Arch and Motorola argue that some spectrum should be allocated to nationwide service. Echo states that the economies of scale available to nationwide licensees would translate into better and lower cost service to subscribers. PageNet states that at least some, if not all, licenses should be granted on a nationwide basis since it is doubtful that smaller carriers would be able to satisfy demand for service quickly and efficiently because of the difficulties inherent in aggregation. Mtel suggests allocating three nationwide spectrum blocks. Telocator also supports both nationwide and large regional licensed service areas, and states that there is a clear consensus that exclusively local licenses are not needed for narrowband PCS. American Paging proposes that 25% of the spectrum be licensed on a nationwide basis. Ericsson proposes that channels be allocated on a 40% regional and 60% nationwide basis.

24. A number of commenters support establishment of large regions for narrowband PCS. Telocator, with support from Dial Page and others, suggests that we establish five large regions for narrowband 900 MHz PCS service.[19] Telocator argues that the traditional paging market is increasingly regional, national and even international in service coverage and that economic efficiencies in wireless messaging dictate nationwide and regional licensed service areas. It also states that larger licensed service areas are needed in order to achieve economies of scale necessary for development of low cost personal receivers. Telocator further submits that many paging providers have concluded that the economic viability of narrowband services in smaller licensed service areas is doubtful. Southwestern Bell Corporation suggests that there be nine to ten regions for narrowband PCS. The Small Business Administration proposes that the 47 MTAs be used as the basis for defining narrowband PCS licensed service areas. UTC suggests that we use either the 47 MTAs or the 194 LATAs.

25. Other parties support the provision of smaller licensing areas for narrowband PCS. Celpage, Inc. (Celpage) states that paging is essentially a local service and that there is no justifiable basis for designating only region-wide or nationwide service. Celpage and others, such as Freeman Engineering Associates, Inc. (Freeman), favor using the cellular metropolitan statistical area and rural service area (MSA/RSA) model for narrowband PCS licensed service areas. NYNEX Corporation also requests that we reconsider using cellular licensed service areas because MSAs/RSAs would allow the prospective PCS market to develop in a recognized cellular licensed service area and thus induce inter-service competition as well as intra-service competition, would help ensure more widespread deployment of PCS in both metropolitan and rural licensed service areas, and would be far easier to consolidate than to sell off portions of a larger licensed service area. CTP supports license areas that are based on the 194 telephone LATAs because it considers PCS as in part a wireless local loop service and feels that the strongest PCS network approach should match the local telephone system, which is on LATA basis.

26. While there appears to be interest in providing narrowband PCS services across a wide range of local, regional and national licensed service area sizes, the majority of the parties commenting on this issue favor large regional or nationwide licensed service areas. We concur with the commenting parties that large regional and nationwide licensed service areas would provide economies of scale, and should alleviate some of the problems licensees have experienced when they tried to aggregate smaller licensed service areas. As we noted above and in our original *Notice*, large regional and nationwide licensed service areas would provide for flexibility in the design and implementation of narrowband PCS services. We also recognize that large regional and nationwide licensed service areas will further our goal of fostering the swift implementation and deployment of narrowband PCS services and systems. Accordingly, we are setting aside the majority of spectrum and channels for nationwide and large regional licensed service area use. For the regional licensed service area, we regard the 47 MTAs as a good compromise between the

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[16] *See Notice* at para. 62.

[17] A Basic Trading Center is defined in the Rand McNally *1992 Commercial Atlas & Marketing Guide*, 123rd Edition, pp. 36-39 as a city which serves as a center for shopping goods purchases for the surrounding area. Shopping goods are those retail items a shopper ordinarily travels some distance to purchase and for which he or she compares qualities, styles and prices before buying. Most sales of shopping goods are made through general merchandise or apparel stores. Basic Trading Centers also serve their surroundings with various specialized services, such as medical care, entertainment, higher education and a daily newspaper.

BTAs are an area surrounding at least one Basic Trading Center. Each BTA is named after one or more cities which are its Basic Trading Centers. All BTA boundaries follow county lines and are drawn to include the county or counties whose residents make up the bulk of their shopping purchases in the area's Basic Trading Center or its suburbs. Some BTAs have 2 or more Basic Trading Centers, generally because residents may conveniently shop at either one.

[18] A Major Trading Center is a city within a MTA that serves as one of the trading area's primary centers of wholesaling, distribution, banking, and specialized services such as advertising.

A MTA is an area consisting of 2 or more BTAs. A MTA's boundaries follow the boundaries of its BTAs. Each MTA is named after one or more cities which are its Major Trading Centers. See Rand McNally *1992 Commercial Atlas & Marketing Guide*, 123rd Edition, pp.36-39.

[19] PacTel Paging also suggests a plan for 5 large regions that is very similar to that proposed by Telocator.

three to five large licensed service areas suggested by PacTel and Telocator, and the smaller areas suggested by other commenters for narrowband PCS. We find that the 47 MTAs would provide for more reasonable and homogeneous markets for the provision of PCS services. If larger licensed service areas are required for certain narrowband PCS services, nationwide PCS channels are available. In addition, aggregation of MTA licensed service areas will be permitted.

27. While the majority of the channels will be designated for nationwide and MTA use, we recognize that there are a variety of narrowband PCS services that could be offered at the local level. We believe that by providing channels at the local level,[20] we will foster broader participation in narrowband PCS, allow entry by smaller firms and businesses, increase competition and promote diversity in the provision of narrowband PCS services. Therefore, we will designate some channels for narrowband PCS use for the 487 BTAs. In addition, we are using BTAs for the licensed service area for the unpaired acknowledgement channels being provided for use by existing licensees. We conclude that this approach is appropriate given the limited number of channels and the fact that most existing paging is now licensed on a local basis.

28. As indicated above, the licensed service area and channeling plan we are establishing will accommodate operation of competitive PCS services at the nationwide, regional and local levels. The plan we are adopting is as follows:

Licensed Service Area	Channels Available
Nationwide	3 - 50 kHz paired with 12.5 kHz 5 - 50 kHz paired with 50 kHz 3 - 50 kHz unpaired
Regional (47 MTAs, plus Alaska separate from the Seattle MTA; Puerto Rico and U.S. Virgin Islands; Guam and Northern Marianas; and American Samoa.)	7 - 50 kHz paired with 12.5 kHz 4 - 50 kHz paired with 50 kHz 2 - 50 kHz unpaired
Local (487 BTAs, plus American Samoa, Guam, Northern Marianas, Puerto Rico, and U.S. Virgin Islands)	2 - 50 kHz paired with 12.5 kHz 8 - 12.5 kHz unpaired for use by existing paging licensees

Licensing Issues

29. *Eligibility.* In the *Notice* we sought comment on whether there should be any eligibility restrictions for cellular and local exchange carriers (LECs) with regard to the provision of narrowband 900 MHz PCS services. We noted that unlike proposed PCS at 2 GHz, narrowband PCS is not likely to provide a competitive alternative to the existing wireline and cellular networks.

30. Most parties addressing this issue support allowing cellular entities and LECs to participate in the provision of narrowband PCS. Some parties do, however, suggest that certain restrictions be applied to participation by cellular carriers and LECs. Arch and Metrocall of Delaware, Inc. (Metrocall) suggest that cellular providers be allowed to participate in narrowband PCS, but only outside their existing licensed service areas. Similarly, Freeman and Metrocall support LEC participation, but only outside their landline service areas. Florida Cellular RSA Limited Partnership (Florida Cellular) proposes that LEC participation be allowed only through a separate subsidiary. UTC also suggests that some form of safeguards be imposed on LEC participation.

31. We conclude that it is appropriate to allow cellular entities and LECs to participate in the provision of narrowband PCS without restriction. The channeling and licensed service area plans we are adopting will ensure that there will be substantial competition among providers of narrowband PCS services. In addition, we believe that the nature of narrowband PCS is sufficiently different from that of the services provided by cellular systems and LECs that any ability they might have to exert undue market power or restrain trade will be negligible.

32. *Limits on Holding Multiple Licenses.* In the *Notice*, we requested comment on whether to permit licensees that may need more spectrum than is provided with a single license to acquire more than one license in the same market. Additionally, we presented alternative options that would place limits on holding multiple licenses: 1) limit

[20] As suggested by NTIA, we also note that local participation in narrowband PCS could occur through franchising arrangements with nationwide and regional PCS licensees.

operators to one license per market; 2) cap the total spectrum a licensee could acquire or use; or 3) decide license merger questions on a case-by-case basis.

33. Parties expressed general support for allowing individual parties to hold multiple licenses in the same market. American Paging proposes that a licensee be permitted to aggregate as many as five 50 kHz channels in each licensed service area. Celpage states that there should be no limit on licenses held per market because this would have anti-competitive implications and the marketplace and the financial wherewithal of the carriers will dictate how many carriers can compete effectively.

34. We conclude that some limits on the holding of multiple licenses are appropriate to ensure that narrowband PCS is offered on a competitive basis. At this time, as indicated above, we also want to provide opportunities for licensees to aggregate or combine channels to provide multiple offerings or wider bandwidth services. Therefore, we will permit a single licensee to hold licenses for up to three 50 kHz channels, paired or unpaired (*i.e.*, no more than 150 kHz paired with 150 kHz).[21] This plan will allow PCS providers considerable flexibility to combine channels to accommodate specific service needs while also ensuring competition in the provision of services.

35. *License Term.* In the *Notice*, we proposed a ten-year license term for narrowband PCS with a renewal expectancy similar to that of cellular telephone service. We noted that without a relatively long license term and a high renewal expectancy, entrepreneurs might be reluctant to make investments in PCS. The commenting parties addressing this issue, which include Metrocall, Mtel and UTC, generally support our proposal for a ten-year license term. We continue to believe a ten-year license term is appropriate for narrowband PCS and will provide incentive for investment and rapid introduction of narrowband services. Accordingly, we are specifying a ten-year license term for narrowband PCS. We will address PCS renewal issues at a future date.

36. *Construction Requirements.* Several commenting parties request that we adopt various schemes to ensure that service is promptly delivered to the public. Specifically, American Paging suggests that, in the absence of anti-trafficking requirements, the Commission adopt a five-year "fill-in" requirement comparable to current cellular policies to preclude "warehousing" of spectrum. NABER urges that we impose strict construction and operational standards with firm benchmarks as conditions for retaining a PCS authorization for the duration of the license term. Dial Page suggests that we require licensees to meet a construction schedule and a channel loading requirement. Freeman requests that specific time limits for construction be set and that if parties do not construct on time, that the construction permits be forfeited and the spectrum made available to other parties.

37. We believe that narrowband PCS will be a highly competitive service and that licensees will have incentive to construct facilities to meet the demand for service in their licensed service areas. While we do not believe that specific loading requirements are necessary, we find that narrowband PCS licensees should be required to meet certain minimum requirements for operation and service to ensure that spectrum is being effectively utilized. We therefore will require that narrowband PCS licensees meet the following construction requirements. Licensees of nationwide service area channels must construct at least 250 base stations within five years and 500 base stations in ten years.[22] MTA licensees must provide coverage to approximately 25% of the geographic area of their MTA within five years and 50% of their licensed service area within ten years; or, alternatively, must construct at least 25 base stations within five years and 50 base stations within ten years. Licensees of BTA service area channels must construct at least one base station and begin providing service in their licensed service area within one year of being licensed. Failure by any licensee to meet the above construction requirements will result in forfeiture of the license and the licensee will be ineligible to regain it.

Small Business

38. Our regulatory structure, *supra*, provides significant opportunities for participation by small business entities. We are authorizing over 5,500 new licenses for national, regional and local narrowband PCS providers. The availability of these new licenses provide significant opportunities for small business participation through licensing at a local level and potential market opportunities with national and regional licensees. There also should be corollary opportunities for small businesses engaged in design and manufacturing associated with the new equipment and components necessary to implement these new services. In addition, we expect to address small business concerns in future proceedings when we consider details of the licensee selection process.

Technical Standards

39. In the *Notice*, we proposed a technical framework that would permit significant flexibility in the design and implementation of narrowband PCS systems, devices and services. The proposed antenna height, radiated power and out-of-band emission rules were intended as the minimum technical standards needed to limit interference both to the new services and to existing services.[23] The comments generally support our proposal to limit technical standards to those necessary to prevent interference.

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[21] This limit is based on the total spectrum in the licensee's nationwide, regional, and local licenses at any geographic point. For example, a licensee could have one nationwide 50/50 kHz channel and two 50/12.5 kHz channels in the Atlanta MTA. The licensee would then be ineligible for another nationwide channel or a 50 kHz channel anywhere in the Atlanta MTA.

[22] Our intention is to ensure that nationwide licensees provide service to a substantial portion of the country. The standards that we are adopting will require that nationwide licensees provide service to an area equivalent to about 20% of the geographic area of the continental United States. In evaluating licensee performance, we shall consider that each base station serves a geographic area of 3000 square kilometers (or a radius of approximately 32 kilometers). In cases where a licensee constructs lower-powered base stations that serve smaller areas, the licensee must aggregate those facilities to provide a service area equivalent to 3000 square kilometers. For purposes of complying with the construction requirements, we will consider such multiple facilities to be equivalent to a single base station.

[23] Several parties in this proceeding draw attention to the need to develop a plan for allocating telephone numbering resources

40. *Power and Antenna Height Limits.* In the *Notice*, we proposed rules for power and antenna height that are similar to the existing technical standards for common carrier paging services contained in Part 22 of our rules.[24] We noted that services similar to those envisioned by the petitioners already operate in segments of spectrum adjacent to each of the narrowband PCS bands and that many of the petitioners have stated that existing paging antenna height-power limits would be appropriate. We therefore proposed that nationwide narrowband PCS systems adhere to power limits identical to those of Section 22.505(c)(2) of our rules. This would limit nationwide paging to a maximum effective radiated power (e.r.p.) of 3500 watts, with no restrictions other than FAA limits on antenna height above average terrain. We proposed to subject regional narrowband PCS systems to an antenna height and power reduction table identical to that of Section 22.505(b). Additionally, we proposed that the minimum distance separation between regional base stations be 113 kilometers (70 miles). Finally, we proposed that the affected parties be allowed to negotiate alternative operating limits and agreements if the antenna height and power rules prove too restrictive.

41. Commenters agree that the antenna height and power rules should be based on the existing Part 22 paging standards.[25] However, Telocator requests that the rules proposed for nationwide licenses also be applied to regional licenses. Motorola also suggests that the power and height limits for nationwide and regional systems be the same and that the power limit be raised to 7 kilowatts (kW) e.r.p. per 50 kHz, as long as applicable emissions mask limits are met. Motorola argues that one of the major benefits of licensing large regional areas is allowing licensees to realize economies of scope in the provision of service over wide areas. Because the number of licensees operating on any particular channel would be limited, and thus coordination relatively simplified, Motorola believes nationwide paging power limits would not unduly complicate co-channel coordination and would have substantial wide area coverage cost benefits for regional systems.

42. In view of the fact that we are providing for large regional and local licensed service areas as well as nationwide licensed service areas, we are adopting 3.5 kW e.r.p. per authorized channel as the power limit for all narrowband PCS base stations. Additionally, all narrowband PCS base stations will be unlimited in antenna height except for those MTA and BTA base stations located close to a MTA or BTA border. We believe that these rules will allow all carriers to more quickly and economically cover their licensed service area and will generally provide comparable service to existing paging operations.

43. For base stations located near a border, we are adopting the general approach proposed in the *Notice* in order to protect systems in adjacent MTAs and BTAs. Specifically, the antenna height and transmitter power of all regional and local base stations that are located between 200 kilometers (124 miles) and 80 kilometers (50 miles) from their licensed service area border are limited in accordance with the following table:

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to new PCS services. We recognize the importance of numbering plan issues, including numbering plans applicable to PCS, and we intend to address these issues in a separate proceeding.

[24] The standards contained in Part 22 for common carrier paging services are similar to those in Part 90 governing private land mobile paging systems. *See* 47 C.F.R. Part 22, Subpart G and Part 90, Subpart P.

[25] We note that the height and power rules for the 931-932 MHz band has been proposed to be changed to 3.5 kW e.r.p. with no height restriction. See *Notice of Proposed Rule Making and Order Granting Petition for Waiver*, CC Docket No. 93-116, 8 FCC Rcd 2796 (1993).

Antenna Height Above Average Terrain in meters (feet)	Effective Radiated Power (e.r.p.) (watts)
183 (600) and below	3500
183 (600) to 208 (682)	3500 to 2584
208 (682) to 236 (775)	2584 to 1883
236 (775) to 268 (880)	1883 to 1372
268 (880) to 305 (1000)	1372 to 1000
305 (1000) to 346 (1137)	1000 to 729
346 (1137) to 394 (1292)	729 to 531
394 (1292) to 447 (1468)	531 to 387
447 (1468) to 508 (1668)	387 to 282
508 (1668) to 578 (1895)	282 to 206
578 (1895) to 656 (2154)	206 to 150
656 (2154) to 746 (2447)	150 to 109
746 (2447) to 848 (2781)	109 to 80
848 (2781) to 963 (3160)	80 to 58
963 (3160) to 1094 (3590)	58 to 42
1094 (3590) to 1244 (4080)	42 to 31
1244 (4080) to 1413 (4636)	31 to 22
Above 1413 (4636)	16

For heights between the values listed above, linear interpolation shall be used to determine maximum e.r.p.

44. We are extending the above table in order to allow operators to provide service in areas close to their licensed service area border. Specifically, regional and local base stations located less than 80 kilometers (50 miles) from their licensed service area border must limit their effective radiated power in accordance with the following formula:

$$P_W = 0.0175 \times d_{km}^{6.6666} \times h_m^{-3.1997}$$

P_W is effective radiated power in watts

d_{km} is distance in kilometers

h_m is antenna height above average terrain in meters

45. Furthermore, we will consider waivers to these rules on a case-by-case basis for licensees that believe additional power is required due to individual circumstances. Finally, in order to provide the flexibility needed to address particular operating circumstances, all PCS licensees are permitted to negotiate alternative operating limits and agreements with co-channel licensees in adjoining PCS licensed service areas if they so desire.

46. *Mobile Power Limit.* We proposed that mobile and portable stations be limited to a maximum of 7 watts e.r.p. We also proposed that mobile and portable transmitters have built-in the capability to automatically limit radiated power to the minimum necessary for successful communication with the associated base station. The comments generally support the proposed power limit; however, Mtel suggests that automatic power control would be extremely costly to implement and would have limited utility for decreasing interference. Based on the comments, we are adopting the proposed 7-watt e.r.p. power limit and are not requiring use of automatic power control.[26]

47. *Out-of-Band Emissions.* In the *Notice*, we proposed to subject narrowband PCS systems to emission limits identical to those of existing Section 22.106(b)(4)[27] and that all operations be subject to provisions identical to Section 22.106(c) of our rules.[28] These existing rule sections apply to paging-type operations that employ digital modulation and bandwidths greater than 12.5 kHz. We requested that parties commenting on this issue take into account whether the licensed service area would be national, regional or local, the type of service offering, the method of communications (for example, simulcast microcellular) and the degree to which co- and adjacent channel or adjacent band services must be protected.

48. Mtel concurs that the proposed emission mask will sufficiently limit out-of-band power while permitting significant flexibility in system design and operation. UTC submits that narrowband PCS systems should be required to utilize adaptive power control and that the current

[26] Motorola suggests that the rules should specify *average* power limits, and we are adopting Section 99.407(f) to clarify how the averaging is to be done.

[27] *See* 47 C.F.R. §22.106(b)(4); *see also* Section 99.411(a) of the attached Final Rules.

[28] *See* 47 C.F.R. § 22.106; *see also* Section 99.411(b) of the attached Final Rules.

out-of-band emission limits are not sufficiently stringent. Motorola states that the new spectrally efficient technologies fully utilize the available bandwidth. Motorola suggests that the shape of the attenuation curve should be the same for any value of authorized bandwidth.

49. We agree with Motorola that the shape of the out-of-band attenuation curve should be the same for any value of authorized bandwidth and we are adopting its proposed changes to the out-of-band emission limits. Based on the channeling plan we are adopting above, the maximum authorized bandwidth of narrowband PCS channels will be 10 kHz for 12.5 kHz channels and 45 kHz for 50 kHz channels. In addition, if a licensee aggregates adjacent channels, we will permit a maximum authorized bandwidth of 5 kHz less than the total aggregated channel width.[29] On any frequency outside the authorized bandwidth, the signal level will have to be attenuated in accordance with the provisions shown in Section 99.411 of Appendix A. By adopting the more stringent out-of-band protection suggested by Motorola, the same adjacent channel interference protection will be provided to all narrowband PCS operations, independent of bandwidth.

50. *Interoperability and Roaming.* We proposed not to require inter-system operability among different licensees. Telocator and Metrocall agree that inter-operability and inter-system roaming should not be required. API states that it is of primary importance that each PCS system and equipment be compatible with other PCS systems.

51. We continue to believe that nationwide and regional licensing will permit wide area service capability. Consistent with our plan to provide narrowband PCS providers with broad discretion in the types of services they provide and the technologies used to provide those services, we believe that it is undesirable to require interoperability or inter-system roaming capability.

RF Radiation Limits

52. In the *Notice*, we noted that concern has been expressed over the potential for communications devices to create RF fields that may be harmful to human health. We requested comment on a number of issues relating to this matter. On March 11, 1993, we proposed to amend and update the guidelines we use for evaluating environmental radio-frequency (RF) radiation from FCC-regulated transmitters.[30] The proposed guidelines are designated IEEE C95.1-1991 (IEEE guidelines)[31] and differ from those they replace, the ANSI C95.1-1982 guidelines.[32] For devices operating in the 300 kHz to 1 GHz frequency range, the 1982 ANSI guidelines categorically exclude radiators using input power of seven or less watts.[33] The new IEEE guidelines incorporate generally stricter criteria for hand-carried transmitters operating in the 450 MHz to 1.5 GHz range than the guidelines they replace.

53. Our record on this issue predates our March, 1993 proposal. API suggests that we obtain further data, including testing by federal agencies, and that we not authorize equipment that does not at least meet the current ANSI guidelines. CTP states that its units operate in the milliwatt range, and that the Commission should encourage use of devices with low RF radiation. Ericsson states that it has no information that suggests there is a demonstrated danger from RF from higher frequency digital transmissions, but that nevertheless, the Commission and industry should opt for low power PCS systems to reduce the hazards of RF energy. Motorola states that the permissible power levels associated with PCS radios should be based upon the uncontrolled environment, as defined in the new IEEE guidelines.[34] Additionally, Motorola suggests that there be no output power limits for base stations except where there is the possibility that people could come close to the base station antenna. In such cases, Motorola suggests that base station power be limited to that of mobiles.[35]

54. Due to the important health issues raised by this subject, the fact that no general manufacture of narrowband PCS equipment has yet begun, and to provide for the expeditious initiation of narrowband PCS service, we believe it in the public interest to require PCS equipment manufacturers and licensees to comply with the IEEE C95.1-1991 guidelines pending completion of ET Docket No. 93-62.[36] For the purpose of type acceptance of narrowband PCS equipment we will require that all handheld PCS devices comply with the IEEE specifications for "uncontrolled" environments.[37] Sample calculations are set forth at Appendix C.

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[29] For example, an aggregated 25 kHz channel width results in a maximum authorized bandwidth of 20 kHz, an aggregated 100 kHz channel width results in a maximum authorized bandwidth of 95 kHz, and an aggregated 150 kHz channel width results in a maximum authorized bandwidth of 145 kHz.

[30] *See Notice of Proposed Rule Making*, ET Docket No. 93-62, 8 FCC Rcd 2849 (1993).

[31] Copies can be ordered from the Institute of Electrical and Electronics Engineers, Inc. (IEEE), 1-800-678-IEEE.

[32] *See* 47 C.F.R. § 1.1307(b).

[33] In the domestic public cellular radio telecommunications service, mobiles are limited to 7 watts e.r.p. *See* 47 C.F.R. § 22.904.

[34] Motorola states that this limit would permit an output power of 0.67 watts for 900 MHz hand-carried transmitters, using a worst case frequency of 941 MHz.

[35] Motorola at 33.

[36] Any rules adopted in this proceeding that do not conform with the final rules adopted later in ET Docket No. 93-62 will be modified accordingly.

[37] The IEEE guidelines specify two sets of exposure recommendations, one for "controlled" environments and the other for "uncontrolled" environments. Controlled environments are "locations where there is exposure that may be incurred by persons who are aware of the potential for exposure as a concomitant of employment, by other cognizant persons, or as the incidental result of transient passage through areas where analysis shows the exposure levels may be above [the exposure and induced current levels permitted for the general public, but not those permitted for persons aware of the potential for exposure]." Uncontrolled environments are "locations where there is the exposure of individuals who have no knowledge or control of their exposure. The exposures may occur in living quarters

PIONEER'S PREFERENCE

55. The Commission's pioneer's preference rules provide preferential treatment in its licensing processes to parties that demonstrate their responsibility for developing new communications services and technologies.[38] To be granted a pioneer's preference, an applicant must demonstrate that it "has developed an innovative proposal that leads to the establishment of a service not currently provided or an enhancement of an existing service."[39] Such an applicant will be placed on a pioneer's preference track, not subject to competing applications, and if otherwise qualified will receive a license.[40] Other applicants will compete for remaining licenses in the normal licensing process. We awarded the first pioneer's preference to Volunteers in Technical Assistance (VITA) in the low-Earth orbit (LEO) mobile satellite service for its having developed and demonstrated the feasibility of using a LEO satellite system on VHF/UHF frequencies for civilian digital message communications purposes.[41] In addition, in two other *Tentative Decisions* we have tentatively awarded four additional pioneer's preferences.[42]

Grant of Pioneer's Preference

56. Grant of a pioneer's preference is based upon an innovative proposal. Our rules are intended to foster development of new services and improve existing services by reducing the delays and risks innovators otherwise would face with the Commission's licensing process. We noted in the *Tentative Decision* that the pioneer's preference rules have sparked substantial interest on the part of a wide variety of parties that we believe will lead to implementation of significant new services and technologies that benefit our nation.

57. In the *Tentative Decision* in ET Docket No. 92-100, we initially determined that Mtel, PP-37, should be granted a pioneer's preference for having developed and demonstrated the feasibility of significant innovations that will permit delivery of existing paging services and new advanced paging and messaging services in a spectrum-efficient manner. Specifically, Mtel improved by a factor of ten bit transmission rates for simulcast paging, developed the necessary technology, and designed an innovative proposal based upon these improved rates and technology that would result in more efficient delivery of current paging services and permit the provision of new messaging and related services.

58. Mtel developed and tested "Multi-Carrier Modulation" (MCM) technology capable of transmitting a 24 kilobits per second (kbps) simulcast signal in a single 50 kHz channel. Mtel's system, by employing dynamic scheduling of the base and mobile transmissions, simulcast zoning, and user location registration, is capable of providing a broad range of two-way services in a single 50 kHz channel. By comparison, paging systems today transmit one-way messages at 2.4 kbps, one-tenth the bit rate of MCM technology. The 2.4 kbps rate employed by existing simulcast paging systems limits their service to short messages, but previously has been accepted as necessary for the mobile unit to correctly receive a message that is transmitted from different locations at the same time. Multiple carrier technology is not being used in simulcast messaging service today. Stacking multiple carriers in a channel to increase the data rate presents a number of technically difficult problems, including design of a small, inexpensive receiver capable of demodulating the more complex signal.

59. The more efficient technology developed by Mtel forms the technical foundation for its proposing to offer a variety of services in a system called "Nationwide Wireless Network" (NWN).[43] Mtel's proposed NWN is capable of offering consumers a broad range of two-way services in a single 50 kHz channel, such as advanced messaging with acknowledgement service in local areas or nationwide and a variety of information and messaging services, including transmission of text messages that are lengthy by paging standards. As explained by Mtel, it designed NWN to use terminals that will include a keyboard, display, and memory capable of being used for two-way transmissions of short or long data files and messages. In addition, the two-way capabilities will permit nationwide automatic determination of the general location of subscribers. Finally, Mtel proposes to deploy a base receiver network that efficiently accommodates a large number of users while permitting mobile units to transmit using low power.

60. Mtel's NWN is designed to provide frequency reuse and evolutionary deployment by subdividing the proposed network in an incremental fashion. NWN will register the location of its subscribers so that messages can be transmitted in the appropriate zone. This permits provision in each zone of different messages to different subscribers on the same frequency, even in adjacent zones.[44] Additionally, since all zones will operate on the same frequency, they can be subdivided to provide higher system capacity in a low cost incremental fashion as demand increases.

61. Kleiner, Perkins, Caufield, & Byers (KPCB), an investor in mobile communications, supports a pioneer's preference grant to Mtel. KPCB states that a healthy com-

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or work places where there are no expectations that the exposure levels may exceed [the exposure and induced current levels permitted for the general public]."

[38] The pioneer's preference regulations are codified at 47 C.F.R. §§ 1.402, 1.403, 5.207 (1992). *See Establishment of Procedures to Provide a Preference*, Report and Order, 6 FCC Rcd 3488 (1991) (*Pioneer's Preference Report and Order*); recon. granted in part, *Memorandum Opinion and Order*, 7 FCC Rcd 1808 (1992) (*Pioneer's Preference Recon. Order*); further recon. denied, *Memorandum Opinion and Order*, 8 FCC Rcd 1659 (1993) (*Pioneer's Preference Further Recon. Order*).

[39] 47 C.F.R. § 1.402.

[40] *Id.*; *see also Pioneer's Preference Further Recon.*, 8 FCC Rcd at 1659.

[41] *See Report and Order*, 8 FCC Rcd 1812 (1993).

[42] *See Tentative Decision and Memorandum Opinion and Order*, 7 FCC Rcd 7794 (1992) (pioneer's preferences tentatively awarded to American Personal Communications, Cox Enterprises, and Omnipoint Communications in the 2 GHz PCS proceeding); *Notice of Proposed Rule Making, Order, Tentative Decision and Order on Reconsideration*, 8 FCC Rcd 557 (1993) (pioneer's preference tentatively awarded to Suite 12 Group in 28 GHz local multi-point distribution service proceeding).

[43] The binary FSK modulation currently used by paging systems shifts the frequency of a sinusoidal carrier from one frequency (representing a binary 1) to another frequency (representing a binary 0) according to the baseband digital signal. Mtel proposes a multi-level FSK modulation (or Multi-Carrier Modulation) that would use multiple frequency shifts to increase the amount of information throughput.

[44] In cases in which a subscriber has moved or is in an overlap region, the message is transmitted nationwide.

petitive marketplace will be achieved by authorizing efficient services, such as Mtel's, in modest amounts of spectrum.

62. A number of other parties neither support nor oppose Mtel's grant, but instead assert that they also deserve pioneer's preferences.[45] PageMart also argues that only service innovations should qualify for preferences and that Mtel's proposed grant is for a technology, not a service. PageNet similarly states that the Commission "seems more disposed toward rewarding 'invention,' rather than innovation." PageMart also asserts that even if Mtel merits a preference, the Commission is not limited by either its pioneer's preference rules nor regulatory policy to limit the number of preferences awarded. It contends that granting only one preference undermines the purpose of the pioneer's preference regulatory procedure because granting additional preferences would bring new services to the public more rapidly.

63. With regard to PageMart's and PageNet's arguments that service innovations rather than inventions should be recognized by award of pioneer's preferences, we note that our pioneer's preference rules specify that a preference may be awarded for innovative service or technology.[46] We proposed that Mtel be granted a preference both for its innovative service offering and its technical innovation that permits spectrally efficient delivery of both existing and new services to the public. We also agree with PageMart that more than one preference can be granted in a proceeding.[47] However, in our *Tentative Decision* we concluded, subject to further comment, that only Mtel qualifies for a preference for narrowband PCS and we affirm that decision here.

64. Three parties oppose granting Mtel a pioneer's preference on its merits: Arch, BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Enterprises, Inc. (BellSouth), and Florida Cellular. Additionally, BellSouth filed extensive comments attacking our underlying pioneer's preference rules, discussed *infra*.

65. With respect to the specifics of Mtel's proposal, BellSouth argues that it is not technologically innovative because multi-tone modulation techniques[48] were previously developed by others. BellSouth particularly points out that Mtel references books about MCM dated from 1968 to 1980. At the same time, BellSouth asserts that Mtel has not substantiated its claim to having developed innovative MCM technique and that the only data Mtel has provided are simulations by an outside laboratory that at the time of the *Tentative Decision* had not been validated. BellSouth also contends that even the simulations were not comprehensive and that factors such as Rayleigh fading and multipath delay were not taken into account. Florida Cellular also claims that Rayleigh fading has prevented achievement of acceptable bit error rates at 24 kbps. BellSouth additionally notes that the laboratory performing the simulations, MPR Teletech, stated that it was unable to analyze the performance of orthogonal carrier spacing,[49] which BellSouth claims is an important aspect of Mtel's technology.

66. BellSouth also argues that Mtel's "adaptive zoning"[50] is merely a variant on the technique used for registration of units in the cellular service. BellSouth states that Mtel's Contention Priority Oriented Demand Assignment (CPODA) technology[51] already is employed in the packet satellite service, but that Mtel refers to CPODA as one of its technological innovations. Florida Cellular asserts that Mtel's choice of the CPODA protocol over the ALOHA protocol[52] impairs Mtel's proposal because CPODA is more expensive and timing control and synchronization of the simulcast signal is more complex, requiring specialized equipment with timing constraints. Florida Cellular claims that Mtel's use of CPODA in its nationwide simulcast system would require tight control of synchronization of the network's transmitters and that the ALOHA protocol is more suited to the type of system Mtel proposes and requires very sophisticated and expensive equipment that will increase the price to the consumer.

67. Finally, BellSouth asserts that Mtel's NWN is more of a two-way mobile data service than a paging service, and claims that similar data services already are being provided more efficiently by BellSouth's affiliate RAM Mobile Data's Mobitex system. BellSouth claims that NWN requires 2.8 hertz to transmit a bit of data, whereas RAM's Mobitex requires only 1.6 hertz to transmit the same bit. Florida Cellular also asserts that NWN is not particularly spectrum efficient, arguing that while MCM permits increased throughput relative to paging technology currently used, this does not qualify as a significant communications innovation because: 1) Nippon Electric Corporation (NEC) has introduced paging technology with transmission rates in excess of 6250 bps in a 25 kHz channel; and 2) Reed Solomon (RS) and Bose Chaudrey (BCH)[53] forward error correction and data compression techniques have achieved greater spectral efficiency than Mtel's 0.36 b/Hz.

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[45] *See, e.g.* letter to the FCC Chairman dated August 12, 1992 filed jointly by PageNet and PageMart. *See also* Comments filed by Dial Page, Freeman Engineering, and Global.

[46] 47 C.F.R. § 1.402.

[47] *Pioneer's Preference Report and Order*, 6 FCC Rcd at 3495 (1991) ("If the Commission adopts rules that combine aspects of two or more applicants' proposals or rules that permit the use of two or more applicants' proposed technologies, we believe that more than one preference would be warranted.") Indeed, in our *Tentative Decision* on pioneer's preference requests filed in GEN Docket No. 90-314, *supra*, we initially determined to award three pioneer's preferences in the same service.

[48] MCM techniques modulate several subcarriers at a certain baud rate in a certain bandwidth to achieve more than one bit per baud interval.

[49] Mtel defines orthogonal carrier spacing as a technique where the data rate, in baud, is equal to the spacing, in hertz, between subcarriers.

[50] Mtel contends that "adaptive zoning" is a misnomer for Mtel's adaptive registration, which uses data acquired from the customer's usage patterns to locate portables and registers their locations in an efficient manner.

[51] CPODA is a transmission protocol that Mtel has customized for its purposes. Mtel's version of CPODA has the channel request carry a description of the traffic the portable wishes to transmit, so the central scheduler can optimize the reverse channel assignment and not require packet-by-packet channel requests.

[52] The ALOHA protocol is similar to CPODA, but less complex. It is a time division technique in which bursts of data are sent on demand. If two different data transmissions overlap, each is repeated after a random time delay.

[53] RS and BCH are cyclic error correction coding schemes.

68. Mtel responds to each argument. With regard to MCM techniques, Mtel states that while these techniques are not new, they have not been previously implemented in a simulcast paging environment because of significant technical constraints. Mtel states that it is the first to invest the effort in developing MCM so that it can be used for simulcast operation. Specifically, Mtel discusses its experimentation of the appropriate baud to use in order to avoid the problem of time delay spread of simulcast signals. Additionally, Mtel explains that to reduce levels of intersymbol interference it plans to use satellite distribution of data to transmitters and precise time synchronization of its transmitters to permit efficient MCM techniques in a simulcast environment.[54] Mtel also states that it refined its adaptive registration protocol to include the ability to dynamically change the registration capabilities of a portable based on its usage patterns. Additionally, Mtel states that its system would be the first application of CPODA in a personal messaging service and that Mtel customized CPODA for this purpose, including the transmission of a description of portable traffic so the central scheduler can optimize traffic assignments.

69. With regard to BellSouth's assertion that NWN is a data service and less efficient than Mobitex, Mtel argues that two-way mobile data systems like Mobitex are designed for real time interactive communications, whereas NWN is an advanced messaging service with two-way capabilities and is not real time. Mtel states that because its system is a simulcast operation it cannot achieve the same data rates as Mobitex.[55] It also asserts that its 24 kbps far exceeds the current 2.4 kbps data rates used in state-of-the-art paging systems and is almost double the rates of NEC and the European Radio Message Standard (ERMES)[56] in an equivalent bandwidth.[57] Mtel also contends that Florida Cellular mischaracterized NWN's spectral efficiency as 0.36 b/Hz, whereas its spectral efficiency actually is 0.48 b/Hz. Further, Mtel replies that the comparison of RS and BCH techniques to Mtel's technology is inappropriate because RS and BCH techniques are error control coding schemes that are independent of the transmission speed or the modulation scheme.

70. Mtel also argues that CPODA improves throughput over ALOHA, that systemwide synchronization is required for relatively short periods rather than constant global synchronization, and that its synchronization is simple to achieve because simulcast signals carry the same information and all mobiles lock to the simulcast signal once per cycle; therefore, signals need to be synchronized only for the duration of a single cycle. Mtel asserts that it has provided an exhaustive description of all components necessary for NWN in its technical feasibility demonstration, and in addition has demonstrated the economic feasibility of implementing NWN. According to Mtel, MPR Teletech predicts the wholesale cost of NWN modems to be $299 and portables to be $380, and two other equipment manufacturers have estimated wholesale costs for these devices to be under $300; further, NWN service will be less expensive than Mobitex.

71. Finally, regarding its technical showing, Mtel replies that the extensive computer modeling conducted by MPR Teletech was submitted as part of a comprehensive technical feasibility demonstration. Mtel argues that BellSouth does not contest the validity of the computer's validation and that BellSouth fails to demonstrate that the simulations were inadequate to satisfy the Commission's requirement to prove technical feasibility. With regard to Florida Cellular's assertion that the technical phenomenon of Rayleigh fading has prevented achievement of acceptable bit error rates at 24 kbps and BellSouth's assertion that Rayleigh fading was not considered in Mtel's computer simulation, Mtel responds that neither Florida Cellular nor any other party provides evidence or a study proving that 24 kbps could not be achieved. Mtel notes that since its original filing it has filed experimental data demonstrating the successful performance of MCM in a real world environment that includes the effects of all the technical phenomenon, such as Rayleigh fading and multipath delay.

72. Mtel's development of technology permitting attainment of 24 kbps data rates for a nationwide simulcast paging and messaging integrated service is a significant communications innovation of the sort the Commission established the pioneer's preference rules to recognize. Mtel has demonstrated the feasibility of its new spectrum-efficient technology and designed a system based upon it that permits using the same infrastructure to provide both substantially improved and more spectrum-efficient paging services and new one- and two-way messaging services. These demonstrated achievements fit squarely within our rules providing for a pioneer's preference in our licensing processes for an applicant that proposes a new service or use of an innovative technology to enhance an existing service and demonstrates the technical feasibility of its proposal, including the underlying technology upon which it relies if that technology is new or innovative.[58]

73. Concerning the assertions that Mtel is not the inventor of the technologies used in its NWN service, we agree that Mtel did not invent the MCM concept, however, it has demonstrated its role as the innovator of these technologies for PCS.[59] To be eligible for a pioneer's preference the applicant is required to have "developed the capabilities or possibilities of the technology or service" or to have "brought them to a more advanced or effective state."[60] Mtel added significant development to MCM technology to enable it to be used in a simulcast paging and messaging environment. Mtel clearly is the pioneering developer of MCM for this service by virtue of it having solved significant technical engineering problems using MCM. Mtel's work permits it to use this technology in its proposed advanced paging and messaging service. Developing MCM

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[54] *See* Mtel Technical Feasibility Demonstration at 7, 8.

[55] Simulcast modulation techniques are more timing sensitive than non-simulcast techniques; therefore, the baud rate is usually slower to permit the simultaneous reception of more than one signal at a location without having the signals interfere with each other.

[56] ERMES is a European paging system that uses 4-level frequency shift keying to achieve a data rate of 6.25 kbps in a paging channel. NEC also achieves 6.25 kbps in a paging channel.

[57] In a 50 kHz channel ERMES' rate would be 12.5 kbps; NWN's is 24 kbps.

[58] 47 C.F.R. § 1.402(a).

[59] *See* Mtel Reply to *Tentative Decision* at 19.

[60] *Id.*

technology so that it can be used to increase spectral efficiency and provide advanced paging and messaging service is innovative and worthy of a preference.

74. We also agree with Mtel that its proposed NWN is distinguishable from existing services and that its establishment would constitute a service not currently provided.[61] Specifically, NWN is substantially different from Mobitex. The Mobitex two-way mobile data system provides two-way communications in real time, whereas NWN is designed to store messages until a time slot is available for transmission. Additionally, Mobitex is designed around mobiles that send as well as receive lengthy data messages, whereas NWN has greater receiving capacity than mobile data transmission capacity. Finally, Mobitex is designed and implemented as an ancillary cellular service, whereas NWN is designed as a small-bandwidth nationwide simulcast paging and messaging service. For these reasons, BellSouth's comparison of the two is unconvincing.

75. We disagree with Florida Cellular's claim that NWN is not spectrally efficient and that achieving significantly greater throughput does not qualify as innovative. Increasing state-of-the-art simulcast data rates by a factor of ten, to 24 kbps, is both spectrum efficient and innovative. Additionally, Mtel has addressed the timing constraints of its system, justified its choice of the CPODA protocol over the ALOHA protocol, and justified its predicted cost to the public of this service. After an extensive opportunity for comment, the record contains no engineering support or other evidence that substantiates Florida Cellular's claims that a nationwide NWN system would be too complex to be provided at reasonable cost.

76. Finally, Mtel has demonstrated the technical feasibility of its technology and system. Mtel's development work has solved intersymbol interference problems and overcome fading problems that in the past have prevented multicarrier modulation use for simulcast messaging services in a cost efficient manner. Its preliminary field tests provide convincing evidence that 24 kbps paging and messaging service is technically feasible. In particular, no party has provided any study or other convincing demonstration that refutes Mtel's claim that its system provides acceptable bit error rates at 24 kbps.

77. For these reasons, we find that Mtel has demonstrated that its proposed NWN is innovative, spectrum efficient, and technically feasible. Its proposal builds on prior developments and brings them to a significantly more advanced and effective state. Mtel's proposal combines new technologies and modifies existing technologies, then utilizes these developments as the basis for its proposed NWN to provide services in a manner significantly more efficient than existing simulcast paging services. MCM permits transmitting pages and messages at a bit rate ten times that of existing simulcast paging systems and in an equivalent bandwidth. These achievements facilitate provision of a variety of new services to the public, including advanced messaging with acknowledgement, two-way messaging, and determination of subscriber location. Finally, Mtel's NWN proposal is consistent with and helped shape the rules adopted in this proceeding.[62] Accordingly, we grant a pioneer's preference to Mtel for a nationwide license of a 50 kHz unpaired block.[63]

Denial of Pioneer's Preferences

78. In the *Tentative Decision* in ET Docket No. 92-100 we proposed to deny twelve pioneer's preference requests filed in that docket. Additionally, six pioneer's preference requests tentatively denied in GEN Docket No. 90-314 propose PCS services in the 900 MHz range.[64] For the reasons set forth below, we will deny these 18 requests.[65] We note that parties filing 8 of these 18 requests did not respond to the tentative denial of their request.[66] Below we address each of these 18 requests.[67]

79. As we stated in the *Tentative Decision*, it is our intent to reward a party responsible for one or more significant innovations that relate to communications technology and service. Each requester must persuade us that its proposal is innovative, has merit, and that the requester is the original developer and proponent of the specific substantial innovation at issue. We have stated repeatedly that we do not grant pioneer's preferences casually.

80. We wish to caution against misinterpreting the meaning of a pioneer's preference denial. Whether or not an applicant receives a preference is based upon the criteria specified in our rules that require demonstration of innovation and feasibility, *supra*. The rules are not a substitute for the licensing process. Nor does grant of a preference guar-

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[61] *See* Mtel Reply to *Tentative Decision* at 17-20 and 23-25. *See* 47 C.F.R. § 1.402(a).

[62] *See Id.*

[63] Arch and Florida Cellular oppose grant to Mtel of a pioneer's preference that is nationwide in scope, arguing that Mtel's proposed service is not necessarily inherently nationwide. In our *Tentative Decision*, we addressed this issue, stating that "grant of a nationwide preference may be consistent with our underlying goal of promoting competition if our allocation and assignment rules provide multiple nationwide licenses in the 900 MHz band..." 7 FCC Rcd at 5736 (citing the *Pioneer's Preference Report and Order*, 6 FCC Rcd at 3495; *Pioneer's Preference Recon. Order*, 7 FCC Rcd at 1809). We are providing 11 channels for nationwide competitive narrowband services. Given this provision for the development of nationwide competition, we conclude that a nationwide preference is consistent with our goal of promoting a competitive market for these services. Mtel has experience in providing nationwide paging services, has designed its proposed system to be deployed nationwide, and provided evidence that there is a nationwide market for its services. Accordingly, we conclude that in this context granting a pioneer's preference to Mtel for an unpaired 50 kHz nationwide license is in the public interest.

[64] These proposals were considered separately at the tentative decision stage to prevent unnecessary confusion, *see* 7 FCC Rcd 5676 at para. 144 (1992).

[65] Dial Page, Echo Group, Freeman, Montauk, PacTel Paging, and PageMart filed petitions for reconsideration of the Commission's *Tentative Decision*. Because these adjudicative tentative decisions were not final, *see* 47 C.F.R. § 1.106 (1992), the petitions are not accepted but are treated as comments and are fully considered herein. *Cf.* 7 FCC RCd 7794, 7804 at n.20 (1992).

[66] PacTel (PP-39), Skycell, Advanced Cordless Technologies, Inc. (ACT), Advanced Wireless Communications, Inc. (AWC), Dial Page (PP-11), Ericsson Business Communications, Inc. (Ericsson), NAC, Inc. (NAC), Radio Telecom and Technology, Inc. (RTT). -

[67] The requests are addressed in the order they were accepted for comment and assigned a pioneer's preference request number.

antee success in the marketplace. Conversely, denial of a preference is not a negative judgement with regard to the propensity for success of the denied proposal. Rather, grants and denials of preferences are based upon the criteria of our pioneer's preference rules that principally address demonstrations of innovation and technical feasibility.

81. In this proceeding, as in others, at least some of the systems not receiving a preference nevertheless may be technically feasible and capable of competing in the marketplace. In these instances the denial may relate to a lack of specific technical innovation, lack of demonstrated feasibility at the time of our ruling, or to some other criterion specified in our pioneer's preference rules. Parties not receiving a preference remain eligible to receive licenses pursuant to the normal licensing process and we expect that some of these systems may be successfully implemented. This proceeding, in addressing proposed systems, only relates to applying to the proposed systems the criteria that govern award of pioneer's preferences.

82. *Advanced Cordless Technologies, Inc. (PP-4).* ACT proposes to provide a second generation cordless telephone (CT-2) type system. In its request, ACT acknowledges that its proposal is an application of British technology, but nevertheless contends that it deserves a preference because it was the first to propose any PCS service to the FCC. In the *Tentative Decision* in GEN Docket No. 90-314 we proposed to deny ACT a preference because we found that proposing merely to implement an existing CT-2-type service does not meet our threshold for innovativeness. We note that CT-2 already is developed and has been implemented in various parts of the world. We do not consider the introduction of an existing service to meet the criteria of our pioneer's preference rules. ACT did not file comments to the *Tentative Decision* in GEN Docket No. 90-314 and no other party addressed ACT's proposal. We deny ACT's pioneer's preference request for the reasons stated.

83. *Advanced Wireless Communications, Inc. (PP-5).* AWC proposes to use CT-2 technology on spectrum to be shared with the air-to-ground service in the 800 MHz band. As in the case of ACT (PP-4), *supra*, we also proposed to deny AWC a tentative preference because its CT-2 proposal does not meet our threshold for innovativeness. AWC did not file comments to the *Tentative Decision* in GEN Docket No. 90-314 and no other party addressed AWC's proposal. We deny AWC's pioneer's preference request for the reasons stated.

84. *Dial Page, L.P. (PP-11).* Dial Page proposes to provide cordless telephone services between buildings using equipment that operates in the 800 MHz band. In the *Tentative Decision* in GEN Docket No. 90-314 we proposed to deny Dial Page's request for failure to demonstrate the technical feasibility of its proposal. Additionally, Dial Page's proposed cordless phone operations fail to meet our threshold for innovativeness and propose use of spectrum outside the bands being allocated for narrowband PCS. Dial Page did not file comments to the *Tentative Decision* in GEN Docket No. 90-314 and no other party addressed Dial Page's proposal. We deny Dial Page's pioneer's preference request for the reasons stated.

85. *NAC, Inc. (PP-14).* NAC proposes a system it calls "Personal Network Access Communication System" (PNAC) that would use a wireless microcellular network to provide signalling and control of communications in connection with existing telecommunications networks. According to NAC, its PNAC system would route calls to the user's location and notify the user that a call has been forwarded. The user could take the call at a nearby phone, respond with a message, or store a message. NAC states that its PNAC system requires 250 kHz of spectrum and that voice communications are limited to existing communications systems.

86. In the *Tentative Decision* in GEN Docket No. 90-314 we proposed to deny NAC a preference because its technical showing did not demonstrate that it had developed the capabilities or possibilities of a specific identifiable PCS technology or that it had brought it to a more advanced or effective state. NAC did not file comments to the *Tentative Decision* in GEN Docket No. 90-314 and no other party addressed NAC's proposal. We deny NAC's pioneer's preference request for the reasons stated.

87. *Dial Page, L.P. (PP-35).* Dial Page proposes to integrate low power transmitters into existing paging receivers to provide an acknowledgement function indicating that a page was received by the user. Dial Page states that its technology also may be used for other automatic data applications, such as meter reading, telemetry control, and credit card verification. Dial Page claims that its "Digital Signal Processing Receiver," proposed to be used at its base stations to receive acknowledgements, provides improvement of four orders of magnitude in signal to noise ratio compared to conventional receiver techniques.

88. In the *Tentative Decision* in ET Docket 92-100 we proposed to deny Dial Page's pioneer's preference request because we did not consider the concept of acknowledgement paging itself to be innovative and because Dial Page had not demonstrated the technical feasibility of its system.[68] In a petition for partial reconsideration, Dial Page argues that it was the first to propose acknowledgement paging and that it now has conducted over-the-air tests demonstrating technical feasibility.

89. While we now agree with Dial Page that it has demonstrated the technical feasibility of its proposal, Dial Page still has failed to demonstrate that its acknowledgement paging proposal, or any part thereof, is a significant innovation. Additionally, although unclear, it appears that Dial Page is comparing its digital receiver to conventional analog receivers, not to other digital receivers. Digital receivers commonly are used in other services but Dial Page does not address how its receiver differs from other digital receivers. We therefore find its receiver comparison statements unconvincing. Accordingly, for the reasons stated, we deny Dial Page's pioneer's preference request.

90. *Echo Group L.P. (PP-36).* Echo proposes a two-way mobile data radio service (MDRS). As proposed by Echo, MDRS would consist of five 5 kHz inbound packet data channels and five 5 kHz outbound packet data channels. Due to a request for confidentiality associated with Echo's June 1, 1992 progress report, the report was not considered

[68] We erred in the *Tentative Decision* in asserting that Dial Page had not demonstrated the feasibility of its system.

at the time of the *Tentative Decision* and its pioneer's preference request was proposed to be denied for failure to demonstrate technical feasibility.[69]

91. During the initial comment period on Echo's request Mtel, PageNet, and PageMart all submitted comments arguing that MDRS was developed for cellular mobile data and private land mobile services already authorized to operate in the 220 and 900 MHz bands. These parties argue that a pioneer's preference for a PCS license should not be awarded based upon developments that preceded the pioneer's preference rules and initially were designed for implementation in services already authorized, not PCS. Mtel argues that because this technology was developed earlier for services already authorized, awarding a pioneer's preference to Echo would be counter to the Commission's objective of encouraging innovators to submit proposals that otherwise would not have been submitted. PageNet similarly asserts that MDRS encompasses the same types of two-way services as provided by existing wireless networks, but that MDRS would operate at lower transmission rates than similar existing systems.[70] In its reply comments Echo states that it developed the technology principally for two-way mobile data services in the 800 and 900 MHz range. Echo also asserts that "MDRS is primarily designed for bursty' data communications. Cellular, however, is primarily a voice service for which data has only recently been proposed...." Upon this basis, Echo reasons that its proposed service is significantly different from the cellular service.

92. In a petition for reconsideration of the *Tentative Decision*, Echo argues that it has demonstrated that MDRS is both innovative and feasible. It states that MDRS is a patented technology that permits transmission of high-speed data at low cost as a full duplex data messaging service. Echo adds that MDRS is more spectrum and cost efficient than other two-way data delivery systems. Echo maintains that Mtel's NWN is a single channel, simplex system that will not provide the real time two-way services that MDRS will provide.

93. We agree that MDRS as proposed by Echo is distinguishable from cellular voice services. However, we also agree with commenters that Echo does not differentiate its proposed two-way data service from the other two-way data services being provided or proposed in the cellular service.[71] Further, the record indicates that Echo has been developing its MDRS on land mobile and cellular frequencies in the 800 and 900 MHz bands. The services that Echo proposes are already permitted in these service bands. Notwithstanding this developmental history, Echo has not demonstrated the specific innovative development for which it is responsible that permits provision of MDRS services on PCS frequencies. Additionally, Echo has failed to demonstrate the innovativeness of its technology, given that two-way mobile data operations currently exist in the 800 and 900 MHz bands and the technology relied upon for its proposal appears to consist of existing technologies. Accordingly, for these reasons we deny Echo's pioneer's preference request.

94. *PacTel Paging (PP-38).* PacTel proposes a broadly-defined "advanced architecture paging" (AAP) service which it describes as being intended to provide a high speed one-way unformatted bitstream of information without being limited or constrained by the nature or content of the information to be conveyed. According to PacTel, its open format scheme would permit a variety of services, including existing and advanced messaging and transmissions of graphics, video, E-mail, facsimile, digitized audio, and alphanumeric messages.[72] PacTel proposes to use FSK simulcast technology. It states that it has tested various baud rates and "that the simulcast limit may be increased to around 4800 baud in the near term,"[73] but also states that it is continuing to investigate other modulation techniques and continuing to attempt to achieve higher data rates.[74] For example, PacTel states that it plans to experiment with 4-level Binary Frequency Shift Keying (BFSK), Multi-tone FSK, orthogonal frequency division multiplexing, code division multiple access, Quadrature Phase Shift Keying (QPSK) and Quadrature Amplitude Modulation (QAM). In the *Tentative Decision* we found that it had not demonstrated with particularity its development of a methodology permitting transmission of the information with efficiencies and capacities that were innovative or unique.

95. PageMart and PageNet addressed PacTel's request. They assert that AAP does not employ frequency reuse and therefore would not have sufficient capacity to provide a viable service within the spectrum proposed for each license in this proceeding, would be inordinately expensive, and would not be spectrum efficient. Specifically, PageMart argues that PacTel's long message lengths and city-wide simulcasts without frequency reuse would provide service only to 5000 or fewer subscribers.[75] PageNet states that this limited capacity would force PacTel to charge high fees to relatively few subscribers to pay for infrastructure costs. Both parties argue that even if PacTel is successful in achieving a higher data rate for its system, its lack of frequency reuse would still result in an inefficient system.

96. Additionally, PageNet asserts that the design for AAP limits its efficiency and the services that can be provided because AAP lacks a return signal capability for acknowledgement. This prevents the confirmation of longer, more

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[69] Echo resubmitted the portions of its report for which it had requested confidentiality on June 5, 1992, but at least one confidential marking remained. By the time it was clarified that confidentiality was no longer requested for any portion of the report, the Commission had not considered this document in its decision adopted on July 16, 1992. The report therefore is considered herein as if it had been available in its entirety on June 5, 1992.

[70] *See* PageNet Opposition to pioneer's preference requests at 10.

[71] In its progress report submitted on June 1, 1992, Echo states that the recent decision by nine U.S. cellular carriers and IBM to offer only a higher-cost, higher data rate (up to 19.2 kbps) system increases the importance of granting a nationwide PCS frequency allocation to allow a competing service to be offered to users more interested in an efficient low-cost, lower data rate (2.4 to 9.6 kbps) system. While this argument is neutral with regard to the merits of its MDRS proposal, Echo does not directly address nor demonstrate why providing a competing service that is less efficient merits a pioneer's preference.

[72] *See* PacTel Request at 3.

[73] *See* PacTel June 16, 1992 AAP Reply Comments at 5.

[74] *Id.* at 6 and Attachment 1 at 1, 5. PacTel states that different modulation techniques will be considered at various baud rates to achieve up to 28.8 kbps in a 25 kHz channel.

[75] *See* PageMart Comment to the pioneer's preference requests at 21.

complex data messages. PageNet concludes that because other proposals offer two-way capabilities with high-volume data transmissions, users are not likely to choose AAP over these systems.

97. PacTel replies that AAP increases capacity and spectrum efficiency by increasing transmission baud rates to 4800 and by using advanced modulation techniques to achieve higher data rates.[76] In its Petition for Reconsideration, PacTel asserts that our comparison of its transmission capacity to that of others, and Mtel in particular, is inappropriate. PacTel argues that a proper analysis of the effective rate of data delivery requires consideration of several factors, including the baud rate, the manner in which the spectrum is subdivided, and the modulation and interleaving techniques used to increase the bit rate. We considered several factors in our analysis of the data rate PacTel proposes in its system design, including baud rates. While PacTel may have achieved high baud rates for its system, at the time of the *Tentative Decision*, PacTel had been testing multilevel FSK but had not chosen a modulation technique to implement these proposed higher baud rates, much less demonstrated that the rates could be implemented with advanced modulation techniques in a simulcast environment.

98. In its Petition of Reconsideration PacTel also argues that due to the abbreviated time schedule in this proceeding "the fact that an experimental program has not yet been completed should not be considered decisionally significant...."[77] We do not require that an experimental program be completed, rather we require only that some tentative results be reported to the Commission or that a paper technical feasibility showing be submitted so that from a technological standpoint the Commission may make an informed decision. In this case PacTel did not submit a cohesive system design, demonstrate the innovative features of the design, and PacTel's responsibility for bringing those innovations to fruition or for adapting the innovations for practical use. Rather, PacTel proposed a series of different ideas and plans without demonstrating what specific innovations had been developed by PacTel, as distinguished from general plans to experiment in the future with several promising technologies. Second, in PacTel's case the time schedule of this proceeding should not have hampered its ability to make the requisite technical showing inasmuch as it submitted its request for a pioneer's preference in November 1991 and subsequently submitted experimental reports to the Commission. Under these circumstances, PacTel had ample opportunity to make its showing.

99. We also agree with PageMart and PageNet that AAP is not spectrum efficient or innovative for other reasons. Lack of frequency reuse and lack of a return channel limit AAP's ability to provide advanced data services in a large geographic area. While PacTel proposes to provide regional service, its system does not provide for determining subscriber location, and therefore a message must be simulcast. However, simulcasting does not appear to be feasible because the system's capacity for regional service would be limited by our limitations on spectrum to be assigned to each licensee. Without support from an intelligent network infrastructure capable of providing frequency reuse or acknowledgement, PacTel's proposal does not demonstrate significantly increased spectrum efficiency or innovativeness.

100. Accordingly, as described above, we find that Pactel has not demonstrated its development of an innovative proposal that as a result of our allocation decisions made today is likely to lead to establishment of a service not currently provided or to a substantial enhancement to an existing service.[78] Therefore, we deny PacTel's pioneer's preference request.

101. *PacTel Paging (PP-39).* PacTel proposes a ground-to-air paging service to provide paging to passengers on aircraft. In the *Tentative Decision* we concluded that this proposal is not innovative because the technology already exists and other entities currently provide communications between the ground and aircraft. PacTel did not file comments to the *Tentative Decision* and no other party addressed PacTel's proposal. We find that delivering a page to a specific aircraft is not sufficiently innovative to warrant a preference. Accordingly, we deny PacTel's pioneer's preference request.

102. *PageMart, Inc. (PP-40).* PageMart proposes a two-way service that it names "Personal Information Messaging Service" (PIMS) which it describes as allowing portable, wireless delivery of lengthy text, graphic and facsimile messages, on a nationwide basis, using device-independent subscriber transceivers.[79] PageMart claims that its PIMS proposal combines existing communication technologies into a new network design, centered on radiolocation and frequency reuse, that offers service advantages and cost reductions using existing components. PageMart proposes to use a total of 250 kilohertz - ten 25 kilohertz channels - to provide a non-interactive, non-real time data service that it states will have the capacity and functionality to support "every new application described by every applicant."[80]

103. In the *Tentative Decision* we proposed to deny PageMart's request for a preference, noting that it had not distinguished its proposal from existing systems using the same technologies and that it had stated that its planned experiments would enable it to confirm the feasibility of its system design but that report of these experiments was not received by the time the Commission considered the proposal. In its Petition for Partial Reconsideration, PageMart acknowledges that its proposal does not require development of new modulation schemes nor invention of new communications technologies, but argues that its overall system design, incorporating existing technologies, is innovative and deserving a preference.[81]

104. Responding to the Commission's tentative denial, PageMart argues that the tentative denial was based upon a "conclusion that PIMS is not 'technically feasible,' solely because PageMart has not yet submitted experimental test

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[76] *See* PacTel Paging Reply to pioneer's preference request at 4.

[77] *See* PacTel *Petition for Reconsideration of Tentative Decision Denying Preference Request* at 19, 20.

[78] 47 C.F.R. § 1.402.

[79] On June 16, 1992, Mtel filed a Formal Opposition to PageMart's pioneer's preference request. PageMart moved to strike this pleading as being untimely filed and replied to (Mtel's Opposition on July 1, 1992. To formulate a decision based upon as much information as possible, we find it in the public interest to accept both Mtel's Opposition and PageMart's Reply as late-filed comments. The issues raised in both have been fully considered herein.

[80] PageMart Reply Comments at 2 (June 16, 1992).

[81] PageMart Petition for Partial Reconsideration at i, 12.

results..."[82] and in essence argues that its proposal incorporates only existing technologies the feasibility of which already is known. PageMart also argues that the information it submitted proved the system's feasibility, and that the Commission incorrectly required experimental results rather than construing its written submission to demonstrate technical feasibility.

105. Notwithstanding PageMart's interpretation, this Commission made no finding, implicit or explicit, with regard to whether PageMart's system may ultimately turn out to be feasible. The expressed basis for our decision was that PageMart had not met its burden of demonstrating the feasibility at this time of its system,[83] and therefore we were unable to conclude that it had demonstrated the technical feasibility of its proposal as required by our rules. PageMart's own statement that its experiments will enable it to confirm the system's feasibility casts doubt on later assertions that combining various technologies into a new system to provide a multiplicity of services constitutes a significant "innovation" for purposes of our pioneer's preference rules, yet the technical feasibility of its system is self-evident.

106. We do not so readily accept that combining into a single system various technologies that individually are technically feasible necessarily will result in a new system that itself is technically feasible. In this context, we understood from PageMart's pleadings that it was conducting experiments to demonstrate the feasibility of its proposed system. Insofar as PageMart argues that our rules permit preliminary results of an experiment or a written technical showing to demonstrate technical feasibility, we agree. But after review of the record in this proceeding, we find that, as PageMart itself acknowledges, although the technical parts of PageMart's system already exist alone or within other systems it has neither demonstrated the technical feasibility of its entire proposed system or that its technical feasibility can be assumed. However, PageMart argues that the basis for its pioneer's preference request is not the innovativeness of these constituent parts, but rather, that its system treated as a whole is a new and innovative development. That being the case, PageMart has not demonstrated the technical feasibility of its system as a whole.

107. Beyond demonstrating technical feasibility, our rules require that an applicant demonstrate its development of a new service or technology and that it has developed the capabilities or possibilities of the technology or service or has brought them to a more advanced and effective state.[84] PageMart states that its claim to innovation is in the combining of existing technologies.[85] It states that its proposed system is based in part upon cellular-type frequency reuse incorporating a four cell frequency reuse pattern with flexibility to use micro and pico cells and radiolocation. PageMart does not state what it contributed to this technology, if anything. Indeed, material filed by PageMart states that microcells with as small as 3-cell reuse have been accomplished in the cellular industry.[86] Other parties in this proceeding also proposed to use the cellular reuse plan and a method of radiolocation, and PageMart's system does not appear distinguishable from the others on this basis. 108. PageMart also proposes to not specify a protocol to permit carriage of a variety of services and to use existing technology and equipment to keep costs down. Both of these aspects of its system appear to be design choices which, however well founded in the overall scheme of services to be provided, do not demonstrate innovativeness that would qualify one for a pioneer's preference in our licensing process. Finally, PageMart proposes to use a Personal Computer Memory Card International Association (PCMCIA) for the radio link between its transmitters and a variety of equipment. Again, this may be a well founded design decision, but PageMart has not demonstrated what it has contributed to this technology, if anything, to permit use of such cards.

109. Accordingly, as described above, we find that PageMart has not demonstrated its development of an innovative proposal that as a result of our allocation decisions made today is likely to lead to establishment of a service not currently provided or to a substantial enhancement to an existing service.[87] Therefore, we deny PageMart's pioneer's preference request.

110. *Ericsson Business Communications, Inc. (PP-53).* Ericsson proposes voice and low speed data Business PCS services that it states would use a total of 8 MHz in the 940-948 MHz band. However, we are allocating only 3 MHz from the 901-902, 930-931, and 940-941 MHz bands for narrowband PCS services and this does not accommodate the service Ericsson proposes. Ericsson did not file comments to the *Tentative Decision* in GEN Docket No. 90-314 and no other party addressed Ericsson's proposal. We deny Ericsson's pioneer's preference request for the reasons stated.

111. *Radio Telecom and Technology, Inc. (PP-69).* RTT proposes to use UHF television frequencies for PCS services. Because these frequencies are not under consideration for PCS, we cannot grant RTT a preference. RTT did not file comments to the *Tentative Decision* in GEN Docket No. 90-314 and no other party addressed RTT's proposal. We deny RTT's pioneer's preference request for the reasons stated.

112. *Freeman Engineering Associates, Inc. (PP-79).* Freeman submitted a general proposal to provide E-Mail, tone plus voice, tone only, digital readout, and alphanumeric simulcast paging services.[88] Freeman requests a series of 150 kHz channels, using advanced modulation techniques for its simulcast broadcasts. Additionally, Freeman requests a 56 kHz return channel for mobiles and a series of 56 kHz

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[82] PageMart at ii, 7.

[83] *See* 47 C.F.R. § 1.402(a) (1992); *see also* 6 FCC Rcd at 3494 (1991) ("An applicant for a pioneer's preference will have a significant burden to persuade the Commission that its proposal has sufficient merit").

[84] 47 C.F.R. 1.402 (1992).

[85] In its petition for reconsideration, PageMart states that we recognized the innovativeness of its proposal because we did not tentatively deny its request on those grounds. We made no finding on the innovativeness of PageMart's request in the *Tentative Decision*. Rather, for purposes of the *Tentative Decision*, having found that PageMart had not demonstrated the technical feasibility of its proposal, we did not go on to consider other bases. This should not be confused with a finding of innovativeness.

[86] *See* PageMart December 15, 1992 Supplemental Report App. A at 1.

[87] 47 C.F.R. § 1.402.

[88] *See* Freeman Request at 4.

channels for base station communications. Freeman also proposes the use of multiple satellite receivers to receive the return communications from portables.

113. In the *Tentative Decision*, we proposed to deny Freeman's preference request because Freeman had not demonstrated the feasibility of its technology nor development of the capabilities or possibilities of a specific PCS technology or service. In comments to the *Tentative Decision*, Freeman states that its request sets forth a considerably more detailed explanation of the technical basis for its proposal than the Commission's tentative denial suggests. Specifically, Freeman contends that its proposal: a) allows the integration of multiple modes of operation on a single paging channel; b) envisions an extension of a local area network or public data network to transmit messages or data to portable computers; c) requires a series of 150 kHz channels using advanced modulation; d) requires digitization of the voice message to the pager; e) permits the text messaging service to be integrated in the same bit stream with conventional digital readout and tone alert services; f) permits a 56 kHz reverse channel to be used for mobile and fixed units to allow for response to incoming calls by the paging subscriber; g) permits the 56 kHz reverse channel to be synchronized with fixed station transmitting equipment; h) allows multiple satellite receivers to be used; and i) permits the 56 kHz channels to be used for transmissions from the base stations to the subscriber equipment to allow for the use of packet switching technology in conjunction with the paging system for wireless input of paging calls.

114. We find that Freeman's proposal requires a substantial amount of spectrum that is inconsistent with the rules adopted herein. Additionally, Freeman's proposal indicates the use of 150 baud simulcast equipment, which is slow and not spectrum efficient or innovative. Accordingly, we deny Freeman's pioneer's preference request.

115. *Global Enhanced Messaging Venture (PP-80).* Global proposes an advanced messaging service (GEM) that it describes as transmitting messages at 6.25 kbps rates in a 25 kHz channel. According to Global, the paging device can receive tone-only, numeric, alphanumeric, and binary data over the air. The paging message also can notify the user that a large facsimile or other data message is being stored in the user's mailbox and that the user can connect Global's device to a telephone jack or payphone to receive the message or to send a message to the system. Global's proposal is essentially a two-way data service where the return link and larger out-going messages are sent by wireline. Global's proposed innovation appears to be the use of wireline communications in connection with advanced messaging to increase throughput of a messaging system without requiring more spectrum or higher data rates. The *Tentative Decision* proposed to deny Global for failure to demonstrate technical feasibility and failure to demonstrate the innovativeness of its proposal.

116. PageNet asserts that Global's GEM lacks innovation, arguing that having to connect to the landline telephone network to receive long messages and to acknowledge pages is functionally equivalent to today's paging environment that other advanced paging proposals are attempting to change. Mtel makes a similar observation. Mtel and PageMart assert that GEM consists of packaging an ERMES pager and a landline terminal. PageNet adds that GEM's proposed enhancements are related to the telephone network, not the radio frequency network, and therefore do not qualify for a PCS preference. PageNet adds that if a market for GEM type services should develop, existing paging systems could offer the service under current Commission rules.

117. Global replies that its proposal offers improvement over the error control and interleaving capabilities of the ERMES format, but that it has a patent pending and cannot release the details of the proprietary technology. Global claims that it is not repackaging ERMES technology, but is adding its own coding format, which is 30% more efficient than that of ERMES. Global further asserts that Mtel is merely experimenting with 50% compression techniques. Additionally, Global claims that other compression techniques are not comparable to that used for GEM and that other techniques achieve higher compression only when sending large messages.

118. Global states that its increase in transmission speed increases its spectrum efficiency. Global states that its use of 6.25 kbps data rates are much higher than current 2.4 kbps paging speeds and that its devices are pocket size and not "large and bulky" as PageMart asserts. Global also responds that it was recently formed and it has not made previous proposals similar to GEM. Global contends that the only preexisting element of GEM is the use of the Pagentry device. It further contends that GEM entails nationwide channels to support nationwide simulcast service or multiregional service for subscribers that desire such service. However, Global states that it also would provide zoning and roaming capabilities to reach a subscriber through selective activation of network transmitters. It further states that sending response data by the landline network is an inconvenience today because there is no easy way to input data to the phone. By contrast, Global claims that its device is convenient to attach to the landline network.

119. Additionally, Global claims that we erroneously compared the throughput of GEM's 25 kHz channel to Mtel's 50 kHz channel. Further, Global asserts that we failed to analyze its technical showing as rigorously as the results of an experiment.[89]

120. We believe that connecting to the landline network to receive large messages and acknowledge pages essentially is what paging users do today, and therefore is not innovative. GEM's increase in transmission speed also lacks innovativeness. Finally, we are unable to determine the technical feasibility of GEM's claimed improvement over the error control and interleaving capabilities of the ERMES format because Global has not submitted the technical details of its claim.

121. Global states that it did not submit details of its work with compression rates because it decided to maintain confidentiality. Also, we note that Global stated in its reply comments that it would provide zoning and roaming capabilities through selective activation of network transmitters, but Global did not address this in its request and did not provide any detailed description. Further, creating a device that easily connects to the existing landline network does not qualify as an innovation leading to a pio-

[89] *See* Global at 3.

neer's preference for a radio communication license.[90] Finally, the technologies we have been able to identify that are used in Global's proposal all are currently available and therefore Global has failed to demonstrate the innovativeness of its proposal. Accordingly, we deny Global's pioneer's preference request.

122. *Metriplex, Inc. (PP-81).* Metriplex proposes a service, named Hybrid Data Network with Acknowledgement Paging (HDNAP), to provide alphanumeric paging and data telemetry services with acknowledgement. As proposed by Metriplex, a total of 50 kilohertz would be required for each channel, consisting of 25 kilohertz for transmission of information and a paired 25 kilohertz for transmission of an acknowledgement of receipt. Metriplex proposes allocating 20 channels totaling 1 megahertz to provide this service. In the *Tentative Decision* our proposal to deny Metriplex's request for a pioneer's preference was based upon its not having demonstrated the innovateness and technical feasibility of its proposal.

123. In comments that address the proposed denial, Metriplex argues that it has done significant market identification and technological development related to its proposal. It then goes on to propose that for a 3-year period we award a 50 kHz nationwide license to each applicant for a pioneer's preference in this proceeding. Metriplex argues that doing so would permit each applicant to implement its service proposals and that at the end of the 3-year period the Commission would decide whether to renew each license based upon a report to be submitted by each licensee.

124. With regard to Metriplex's proposal to provide its HDNAP service, we are unable to find that its proposed 2.5 kbps transmission of alphanumeric paging is innovative, inasmuch as paging services using 2.4 kbps technology already are in operation. Insofar as its proposal relates to adding an acknowledgement function on a separate channel, we note that others have proposed the same concept and that Metriplex does not address how, from a technical standpoint, this capability could be efficiently implemented given the constraints of low power, battery drain, and reception difficulties inherent in actual implementation of such a system. Thus we conclude that Metriplex has not demonstrated that its proposal is innovative nor demonstrated its feasibility within the meaning of the pioneer preference rules. Accordingly we deny the request of Metriplex for a pioneer's preference.

125. Insofar as Metriplex proposes changes to our pioneer's preference rules to permit permanent licensing subject to substantive evaluation at short renewal periods, we note that changes to the pioneer preference rules are not within the subjects addressed in this proceeding and therefore cannot be accomplished here. Furthermore, we note that some of the proposals for use of this spectrum would not be accommodated by assigning a pair of 25 kHz channels as proposed by Metriplex.

126. *Mobile Communications Corporation of America (PP-82).* MobileComm proposes a service its names "Verified Information Paging" (VIP) to provide one-way messaging, E-Mail, and other data with acknowledgement services.[91] As described by (MobileComm, this service would be provided using a simulcast system transmitting an 8-level FSK signal in a 50 kHz channel with a data rate of 15 kbps. MobileComm's system also would provide a 12.5 kHz return channel for brief coded acknowledgements at a data rate of 1.2 kbps. VIP also would use autonomous registration to transmit messages from a specific serving base station and would broadcast nationwide if the user does not acknowledge receipt in the last known location. In the *Tentative Decision* we proposed to deny MobileComm's preference request for not having demonstrated the innovativeness nor the technical feasibility of its proposal.

127. During the initial comment period PageNet, PageMart and Mtel filed comments opposing grant of MobileComm's request. PageNet asserts that MobileComm's technical proposal remains in the conceptual phase, lacks technical network design, and features only ideas about potential network configurations.[92] PageMart asserts that MobileComm has failed to provide an adequate description of the system architecture it plans to utilize and that it is impossible to determine with any specificity what service and capabilities MobileComm plans to provide or to verify that MobileComm's claims for data transmission capability would actually work in a real-world messaging environment.[93]

128. Similarly, Mtel claims that MobileComm is vague in describing MobileComm's responsibility for developing the technology, noting that MobileComm only states that it has been working with a major equipment manufacturer to evaluate the suitability of a number of advanced modulation techniques. Mtel asserts that MobileComm's claimed demonstration of technical feasibility is limited to a statement by an expert consultant that 8-level FSK modulation is likely to be a reliable technique for its service. Mtel argues that the analysis upon which the expert based his advice was not provided and that the feasibility of other aspects of MobileComm's proposal have not been demonstrated.

129. Additionally, Mtel claims that the similarities between its system and that of MobileComm "are so extensive as to preclude any claim of innovation" by MobileComm. Mtel continues that comparison of key points in the two requests and the language to describe them shows that MobileComm's proposal "extends well beyond appropriation" and "is almost a clone of "[Mtel's proposal], both technically and linguistically."[94] Mtel follows these arguments with an extensive comparison of textual quotations from Mtel's and MobileComm's pleadings. Mtel concludes that the Commission should deny requests such as MobileComm's that duplicate previously disclosed innovations and do not contain any significant new contribution.[95] Mtel claims that there are only a few differences between the two proposals and that those demonstrate that Mtel's proposed system has greater capabilities.[96]

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[90] *Cf. Report and Order,* ET Docket No. 91-280, 8 FCC Rcd 1812, 1818 at para. 38 (1993).
[91] *See* MobileComm Request at 2.
[92] *See* PageNet at 14.
[93] *See* PageMart at 5.
[94] Mtel's Opposition at 6.
[95] Mtel's pioneer's preference request was filed in November 1991, that of MobileComm in June 1992.
[96] *See* Mtel's Opposition at 2,3.

130. In reply, MobileComm claims that it has described the essential elements of its system architecture and that it has not provided the details of implementing this architecture (which it describes as protocols, coding schemes, and error detection and correction) because they are routine exercises in network design and engineering that it views as unrelated to its pioneer's preference request.[97] MobileComm also states that such information is not relevant to innovative spectrum usage or FCC regulatory policy.[98] Finally, MobileComm argues that its service is not conceptual and that it has identified specifically how it plans to provide its proposed service. This information, MobileComm contends, is sufficient for the Commission to conclude that MobileComm's proposal is innovative and technically feasible. It states that 8-level FSK modulation detection systems are well documented and that the resulting receiver sensitivity figures can be computed directly. Additionally, MobileComm states that preliminary test results indicate that 8-level FSK modulation can be utilized and that a consulting expert advised it that 8-level modulation is likely to be a reliable technique for data transmission in a simulcast system.[99] With regard to arguments that it has not disclosed sufficient information to permit analysis of the specific innovation claimed and the technical feasibility of its proposal, MobileComm states that its relationship with Glenayre Electronics, Inc. is governed by a confidentiality provision and therefore it cannot release its technical support information.

131. Finally, MobileComm asserts that its proposal is different than Mtel's because Mtel's proposed NWN is a two-way service, whereas VIP is proposed as a one-way service with acknowledgement capability. To the extent that there are similarities between the two systems, MobileComm states that those are understandable because MobileComm has sought to fit its system within Mtel's proposed regulatory structure for three providers of generic nationwide messaging service.[100] Further, MobileComm claims that in a multipath environment its 8-level FSK modulation will permit the terminal unit to be more robust and sensitive than that of Mtel.[101]

132. MobileComm did not address the specifics of its system in comments or other filing after our tentative denial. Together with its affiliates BellSouth Corporation and BellSouth Enterprises, MobileComm did join in comments opposing, principally on legal grounds, various aspects of our pioneer's preference rules and their implementation. These issues are discussed separately.

133. Our rules require that each preference request contain, *inter alia*, a description of the service to be provided and the applicant's plan for implementing the service; and demonstrate that the applicant has developed the new service or technology. In deciding whether in our discretion to grant a preference, we consider this information and comments by other parties to determine, *inter alia*, whether the applicant has demonstrated that it is responsible for having developed an innovative proposal.[102] For us to make these determinations, the information submitted must include technical details specific enough for us to determine whether the proposal is innovative. MobileComm has not provided sufficient information for this purpose. In this regard, the details that we find lacking are design details unrelated to whether MobileComm has actually tested its system or otherwise analyzed its technical feasibility. The information required is that which would explain with specificity exactly how its proposed system would work and identify the innovation(s) claimed to justify award of a pioneer's preference under our rules.

134. MobileComm argues that it has not submitted certain information because it is not relevant to our regulatory purposes and is commonly known. Information in this category presumably would not include information relevant to determining innovativeness if it already is common knowledge. MobileComm also argues that it has not submitted certain information because MobileComm has agreed to maintain its confidentiality. Regardless of the reason why information has not been submitted, we are unable to evaluate the innovativeness of MobileComm's proposal under our rules on the sparse information it has chosen to submit. We further note that MobileComm did not submit additional specific information in response to arguments submitted in opposition to its request that its proposal was vague and perhaps only conceptual in nature. Accordingly, based on the information submitted by MobileComm we are unable to conclude that its proposal is innovative as required by our rules.[103] Accordingly, we conclude that the information submitted by MobileComm fails to demonstrate the innovativeness of its proposal, and MobileComm's responsibility for an innovation as required by our rules for award of a preference. Based on MobileComm's failure to file sufficient information to determine innovativeness, we deny its request for a pioneer's preference.

135. In addition, MobileComm has not demonstrated the technical feasibility of its proposal, which provides an additional basis for denial. In a pleading with BellSouth, MobileComm argues that due to the rapidity with which the Commission considered pioneer's preferences related to PCS, applicants were deprived the opportunity of receiving a grant of experimental authority, conducting experiments and submitting the results of those experiments to prove technical feasibility. We note that the subject of PCS has been publicly before this Commission since 1989, and that we addressed narrowband PCS services in the 900 MHz range when we opened this docket in 1990. With regard to advanced paging services in particular, Telocator filed the first petition initiating consideration January, 1991. Furthermore, with regard to late-breaking development of innovative proposals, applicants are permitted to submit written technical filings demonstrating the technical feasibility of their claimed innovations. Applicants are not required to file the results of technical experiments. In any event, as noted above, the dearth of information regarding innovativeness proves an independent basis to deny MobileComm's request for a pioneer's preference.

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[97] *See* MobileComm's Consolidated Reply to Oppositions to Request for Pioneer's Preference at 2.

[98] *Id.* at 10.

[99] *See* MobileComm's Request for Pioneer's Preference at 14.

[100] *See* MobileComm at 3, 10, 13, 16.

[101] *See* MobileComm Comment to RM-7978 at 8.

[102] 47 C.F.R. § 1.402(a).

[103] We also find contradictory to its claim of innovativeness MobileComm's argument that it did not provide certain information because it considers such information to be routine network design.

136. *Montauk Telecommunications Company (PP-83).* Montauk proposes to broadcast news/information and advertising to facsimile machines. In the *Tentative Decision*, we stated that Montauk had not demonstrated the technical feasibility of its system nor addressed why 900 MHz spectrum should be used for a fixed service. In a petition for reconsideration to the *Tentative Decision*, Montauk acknowledges that it has not conducted over-the-air tests of its technology in the 900 MHz range, but states that it has conducted tests over a satellite link. Montauk further states that there is sufficient 900 MHz spectrum to satisfy all proposed advanced messaging services for which pioneer's preference requests have been filed, and that use of this spectrum would result in a lower cost facsimile service.

137. Montauk has not demonstrated the technical feasibility of its service at 900 MHz. Even assuming that Montauk's proposal is feasible in this spectrum, the rules we adopt today governing narrowband PCS limit its use to mobile, with fixed use permitted only if ancillary to mobile use. Accordingly, we deny Montauk's pioneer's preference request.

138. *Paging Network, Inc. (PP-84).* PageNet proposes a service it named "VoiceNow" which, as described by PageNet, would provide a digitized voice paging service with acknowledgement capability. PageNet requests a total of 250 kilohertz to provide this service: one 25 kHz simulcast paging channel for control of pagers, one 25 kHz return channel for page acknowledgement and radiolocation purposes, and eight 25 kHz channels for digital voice message transmission. PageNet's VoiceNow service would employ a cellular reuse scheme similar to that proposed by PageMart for its system, *supra*, *e.g.*, a 4 cell reuse pattern combined with radiolocation capability. In the *Tentative Decision*, we proposed to deny PageNet's request for failure to demonstrate with particularity the part of its proposal that it claims to be new and innovative, and for failure to demonstrate its role in developing a specific new and innovative service.

139. Dial Page asserts that PageNet should not receive a preference because its proposal requires a relatively large amount of spectrum which, if granted, would limit competition. PageMart argues that PageNet's network is very similar to PageMart's PIMS, except that PageNet limits its proposed service to voice-only services. PageMart also asserts that PageNet has not designed its system to use micro or pico cells to increase frequency reuse, and therefore would have to use 16 QAM modulation equipment to attain sufficient capacity to provide the service as proposed. PageMart questions the availability and feasibility of 16 QAM equipment for paging services, stating that such equipment is untested and will not be commercially available in the near future.

140. Mtel contends that PageNet's technical feasibility showing lacks meaningful engineering support. Mtel asserts that PageNet's request offers only an overview of brief technical commentary on its service. Mtel claims that the technical feasibility exhibits raise concerns that a four cell reuse plan suffers from co-channel interference. Mtel asserts that some modulation schemes could possibly operate in the four cell reuse environment, but that 16 QAM cannot.[104] Mtel maintains that the "Webb paper," relied upon by PageNet, states that a 16 QAM signal theoretically requires a signal-to-noise ratio on the order of 25 dB, which Mtel claims cannot be achieved by PageNet's proposal. Mtel asserts that VoiceNow's proposal results in a signal-to-noise ratio of 13 dB at the cell edge and that it is unlikely to achieve a 25 dB signal-to-noise ratio elsewhere in the cell. Mtel also asserts that PageNet's 2400 bps voice encoder's technology and quality is highly suspect as proposed for this service and has not been demonstrated to be feasible or effective.

141. In response to arguments that 16 QAM technology may not be feasible and has not been developed for the applications and environment it proposed, PageNet states that its technologies are feasible, that opponents have mischaracterized its request, and that its request is based upon it having proposed an integration of existing technologies to provide a new service. PageNet maintains that the intelligence contemplated in its network will permit the use of 16 QAM in a four cell reuse environment and further asserts that its system design already is a part of the Digital European Cordless Telephone Standard. PageNet also presents a marketing study done by Economic and Management Consultants International, Inc., which states that there appears to be more demand for voice paging than other types because voice paging allows the user to receive a message without having to return a call.[105]

142. PageNet expresses optimism that the challenges inherent in developing 16-QAM technology for its application can be overcome. Additionally, PageNet states its "engineers have consulted with experts in the digital modulation field, and have concluded that digital modulation using 16-QAM is likely feasible." Nevertheless, PageNet states that should efforts to develop 16-QAM technology for this purpose not succeed, VoiceNow "can still be provided in a highly spectrally efficient and cost-effective manner using other modulation methods."

143. PageNet acknowledges that 16 QAM mobile equipment does not exist, but states that it "is likely feasible." In support of its statements regarding feasibility, PageNet submits affidavits from two engineers. However, both of the statements notably stop short of stating conclusively that this proposal is feasible to implement, and other parties argue that this implementation is not technically feasible. Furthermore, PageNet has not submitted detailed technical information or experimental results of any kind upon which we could determine independently the technical feasibility of its proposal, as required by our rules.[106] Consequently, although PageNet's proposal may be innovative, it has not demonstrated its specific contribution to development of this technology, nor demonstrated the feasibility of its proposed implementation. We therefore deny PageNet's request for a pioneer's preference.

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[104] *See* Formal Opposition of Mtel at 9.

[105] Voice paging is easy for the caller to use because one simply dials a number and his or her voice is recorded and later transmitted. However, voice paging is limited by the type of information that can be conveyed to the user and by the time it takes to send longer messages. While data messaging may not be as convenient to some users as a voice page, there are fewer time and information constraints on data messaging.

[106] We note that after experimental evaluation, PageNet determined that 2400 bps linear predictive coding is not acceptable and states that it will investigate 4800 bps voice coding.

144. *Skycell Corporation (PP-85).* Skycell proposes to use 900 MHz PCS channels for control applications of CT-2 Telepoint payphone services. In the *Tentative Decision,* we proposed to deny Skycell's request for failure to discuss the technical feasibility. Skycell did not file comments to the *Tentative Decision* and no other party addressed Skycell's proposal. We continue to believe that Skycell's request fails to demonstrate technical feasibility. Accordingly, we deny Skycell's pioneer's preference request.

Pioneer's Preference Procedures

145. BellSouth raises issues related to the pioneer's preference rules themselves, rather than the merits of our tentative grants and denials. Although these issues have been dealt with in our pioneer's preference rulemaking orders,[107] in the interest of clarity we will briefly address the issues raised.

146. BellSouth argues that our procedures for awarding pioneer's preference without a hearing are inconsistent with Section 309 of the Communications Act.[108] According to BellSouth, award of a pioneer's preference constitutes award of a license and therefore requires an adjudicative hearing to resolve what it characterizes as the substantial and material questions of fact as to whether a pioneer's preference is warranted. After BellSouth filed these comments, the Commission addressed this issue in affirming the pioneer's preference rules and denying petitions for further reconsideration of those rules.

147. In responding to arguments that a comparative hearing is required between a pioneer's preference recipient and other applicants, the Commission concluded that the rules are consistent with judicial interpretation of our statutory authority. In the leading case related to this issue, *Ashbacker Radio Corp. v. FCC,* [109] the Supreme Court held that if two bona fide applications are mutually exclusive they are entitled to a comparative hearing. Later, in *United States v. Storer Broadcasting Co.,*[110] the Supreme Court clarified that when adequately supported by the record in a rule making proceeding, the Commission may establish threshold standards that applicants must satisfy before they are entitled to be eligible for the comparative consideration held to be required by Section 309 in *Ashbacker.*[111] In addition to ruling that comparative hearings are not required in pioneer's preference cases, the Commission also indicated that a hearing would be appropriate to the extent a substantial and material question of fact exists with respect to a specific pioneer's preference request. Here, we have determined that no hearing is required because no substantial and material question of fact exists relating to whether Mtel meets the standard for a pioneer's preference[112] set forth in the rules.

148. BellSouth also contends that the Commission failed to comply with statutory requirements for hearing cases under the 8Administrative Procedure Act[113] -- no designation for hearing, no notice of the specific issues to be determined in a hearing, no provision for the filing of proposed findings and conclusions, and no adoption of findings and conclusions. Given that there is no right to a hearing, as stated above, these hearing requirements are inapplicable.

149. BellSouth also argues that the Commission has not precisely specified the issues and criteria used in granting or denying pioneer's preferences. Specifically, BellSouth complains that pioneer's preference applicants lack notice of the decisional rules until a final award has been made because "the pioneer's preference is to be awarded at the same time as rules are adopted and is to be based, at least in part, on whether the rules adopted grew out of any pioneer applicant's proposal and the rules 'lend themselves to the grant of a preference.'"[114] As a preliminary matter, it should be noted that the tentative denial of a pioneer's preference request from BellSouth's subsidiary, Mobile Communication Corporation of America (MobileComm), is unrelated to the requirement that the rules adopted lend themselves to the proposal. Nonetheless, when we adopted the pioneer's preference rules two years ago, we addressed this issue:

> it will be our general policy to award a preference to any otherwise qualified innovator meeting our standard even if the Commission's final rules for the service are not identical to the innovator's original proposal. However, if the modifications are so significant that the particular innovator does not meet the eligibility standard, we will not award a preference to that innovator. We believe that such an approach should result in providing innovators with the certainty necessary to garner financial support in a timely manner and should ensure that the benefits of new service can be realized expeditiously by the public.[115]

We are satisfied that there is sufficient certainty upon which innovators may base their proposals.[116] 150. BellSouth further argues that the Commission "effectively rewrote" the pioneer's preference rules in its *Tentative Decision* in this proceeding[117] when it indicated that in evaluating proposals it would consider factors such as "(1) added functionality; (2) new use of spectrum; (3) changed operating or technical characteristics; (4) increased spectrum efficiency; (5) increased speed or quality of information transfer; (6) technical feasibility and (7) reduced cost to the public" among other things.[118] Contrary to BellSouth's assertion, these factors are wholly consistent

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[107] *See* note 41, *supra.*

[108] PageNet similarly argues that the Commission improperly granted Mtel's pioneer's preference request and denied its pioneer's preference request "without conducting the requisite comparative evaluation." PageNet Comment at n.49; PageNet Reply at 30-31. PageNet's argument is rejected for the reasons stated herein.

[109] 326 U.S. 327, 333 (1945).

[110] 351 U.S. 192 (1956).

[111] *Pioneer's Preference Further Recon. Order,* 8 FCC Rcd at 1659 (quoting *Pioneer's Preference Report and Order,* 6 FCC Rcd at 3492 & note 5).

[112] We also find no substantial and material question of fact exists with regard to any of the other pioneer's preference requests that we find clearly do not meet the requirements of the rules.

[113] 5 U.S.C. §§ 556(b)(1), 557(b)(1), 557(c)(1), (3), 557(c)(3)(A).

[114] BellSouth at 8-9.

[115] *Pioneer's Preference Rules Report and Order,* 6 FCC Rcd at 3495.

[116] *See also Pioneer's Preference Further Recon. Order,* 8 FCC Rcd at 1661 ("we believe the pioneer's preference standard is sufficiently clear and objective").

[117] 7 FCC Rcd at 5734-35, in paras. 147-148.

[118] *See* BellSouth at 9 for a complete quotation of the decisional criteria allegedly rewritten.

with and do not deviate from the criteria clearly specified in the Commission's pioneer's preference rule[119] and merely flesh out those standards.

151. In addition to arguing that our procedures for awarding pioneer's preferences are inadequate, BellSouth contends that the pioneer's preference criteria have been applied inconsistently in the tentative decisions in this and the "Big LEO" proceeding.[120] BellSouth states that tentatively none of the Big LEO applicants were granted a preference because their proposals were determined to not be innovative and states that Mtel's proposal similarly is not innovative. BellSouth's arguments in this regard are discussed more fully below. However, it bears noting that none of the Big LEO applicants were found to have demonstrated technical feasibility of their proposals, whereas Mtel was found to have made such a demonstration.[121]

CONCLUSION

152. The allocation of three megahertz of spectrum to narrowband PCS and its associated services rules will enable many new mobile services, particularly AMS. The flexible regulatory approach adopted should facilitate the quick development and implementation of these new mobile services.

PROCEDURAL INFORMATION

153. *Regulatory Flexibility Analysis.* The analysis pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 608, is contained in Appendix B.

154. Accordingly, IT IS ORDERED that Part 2 of the Commission's Rules IS AMENDED and that a new Part 99 IS ADDED to the Commission's Rules as specified in Appendix A, effective 30 days after publication in the Federal Register. This action is taken pursuant to Sections 4(i), 7(a), 302, 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 302, 303(c), 303(f), 303(g), and 303(r).

155. IT IS FURTHER ORDERED THAT the request for pioneer's preference filed by Mobile Telecommunication Technologies Corporation IS GRANTED. IT IS FURTHER ORDERED THAT the requests for pioneer's preference filed by Advanced Cordless Technologies, Inc.; Advanced Wireless Communications, Inc.; Dial Page, L.P. (PP-11 and PP-35); Echo Group L.P.; Ericsson Business Communications, Inc.; Freeman Engineering Associates, Inc.; Global Enhanced Messaging Venture; Metriplex, Inc.; Mobile Communications Corporation of America; Montauk Telecommunications Company; NAC, Inc.; PacTel Paging (PP-38 and PP-39); PageMart, Inc.; Paging Network, Inc.; Skycell Corporation; and Radio Telecom and Technology, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[119] 47 C.F.R. § 1.402(a). These factors were listed in paragraph 48 of the *Pioneer's Preference Rules Report and Order*, 6 FCC Rcd at 3494.

[120] *Mobile-Satellite Service*, 7 FCC Rcd 6414 (1992).

[121] 7 FCC Rcd at 6421-22.

APPENDIX A: FINAL RULES

I. Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2 -- FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 302, 303, 303(r) and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations is amended as follows:

a. Column (1) in the 790-942 MHz bands; column (2) in the 806-942 MHz bands; column (3) in the 890-942 MHz band; column (4) in the 806-902 and 935-941 MHz bands; and columns (5) and (6) in the 901-902, 929-932, and 940-941 MHz bands are revised as follows:

b. § 2.106 Table of Frequency Allocations

* * * * *

International table			United States table		FCC use designators	
Region 1-allocation MHz	Region 2-allocation MHz	Region 3-allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule part(s)	Special-use frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)

* * * * *

790-862 FIXED. BROADCASTING. 694 695 695A 696 697 700B 702	806-890 FIXED. MOBILE. BROADCASTING.		806-902			
862-890 FIXED. MOBILE except aeronautical mobile. BROADCASTING 703. 700B 704	692A 700 700A					
890-942 FIXED. MOBILE except aeronautical mobile. BROADCASTING 703. Radiolocation.	890-902 FIXED. MOBILE except aeronautical mobile. Radiolocation. 700A 704A 705	890-942 FIXED. MOBILE. BROADCASTING. Radiolocation.	US116 US268 G2	901-902 FIXED. MOBILE. US116 US268 US330	PERSONAL COMMUNICATIONS SERVICES (99)	
	902-928 FIXED. Amateur. Mobile except aeronautical mobile. Radiolocation. 705 707 707A					

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704	705	706
	928-942 FIXED. MOBILE except aeronautical mobile. Radiolocation.	

* * *

928-932			
	929-930 LAND MOBILE. US116 US215 US268	DOMESTIC PUBLIC LAND MOBILE (22). PRIVATE LAND MOBILE (90).	
	930-931 FIXED. MOBILE. US116 US215 US268 US330	PERSONAL COMMUNICATIONS SERVICES (99).	
	931-932 LAND MOBILE. US116 US215 US268	DOMESTIC PUBLIC LAND MOBILE (22). PRIVATE LAND MOBILE (90).	
US116 US215 US268 G2			

* * *

935-941			
	940-941 FIXED. MOBILE. US116 US268 US330	PERSONAL COMMUNICATIONS SERVICES (99).	
US116 US215 US268 G2			

* * *

c. Add new 700A and 700B to the international footnotes and new US330 to the United States footnotes:

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INTERNATIONAL FOOTNOTES

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700A *Additional allocation:* in Canada, the United States and Mexico, the bands 849-851 MHz and 894-896 MHz are also allocated to the aeronautical mobile service on a primary basis, for public correspondence with aircraft. The use of the band 849-851 MHz is limited to transmissions from aeronautical stations and the use of the band 894-896 MHz is limited to transmissions from aircraft stations.

700B *Additional allocation:* in Belarus, the Russian Federation and Ukraine, the bands 806-840 MHz (Earth-to-space) and 856-890 MHz (space-to-Earth) are also allocated to the mobile-satellite, except aeronautical mobile-satellite (R) service. The use of these bands by this service shall not cause harmful interference to, or claim protection from, services in other countries operating in accordance with the Table of Frequency Allocations and is subject to special agreements between the administrations concerned.

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UNITED STATES (US) FOOTNOTES

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US330 In the frequency bands 901-902 MHz, 930-931 MHz, and 940-941 MHz, the only fixed services permitted are ancillary services used in support of mobile personal communications services.

* * * * *

II. A new Part 99 of Chapter I of Title 47 of the Code of Federal Regulations is adopted as follows:

PART 99 -- PERSONAL COMMUNICATIONS SERVICES

1. The authority citation in Part 99 reads:

AUTHORITY: Secs. 4, 302, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. Sections 154, 302, 303, and 332, unless otherwise noted.

2. Part 99 is adopted as follows:

Subpart A - General Information

§ 99.1 Basis and purpose.

This section contains the statutory basis for this part of the rules and provides the purpose for which this part is issued.

(a) Basis. The rules for the personal communications services (PCS) in this part are promulgated under the provisions of the Communications Act of 1934, as amended, which vest authority in the Federal Communications Commission to regulate radio transmission and to issue licenses for radio stations. The rules in this part are in accordance with applicable statutes, international treaties and agreements to which the United States is a party.

(b) Purpose. This part states the conditions under which stations may be licensed and used to provide PCS in the frequency bands specified in Subpart C of this part.

§ 99.3 Permissible communications.

PCS licensees may provide any mobile communications service on their assigned spectrum. Fixed services may be provided only on an ancillary basis to mobile operations. Broadcasting as defined in the Communications Act is prohibited.

§ 99.5 Terms and Definitions.

Assigned Frequency. The center of the frequency band assigned to a station.

Authorized Bandwidth. The maximum width of the band of frequencies permitted to be used by a station. This is normally considered to be the necessary or occupied bandwidth, whichever is greater.

Average Terrain. The average elevation of terrain between 3.2 and 16 kilometers from the antenna site.

Base Station. A land station in the land mobile service.

Basic Trading Area (BTA). One of the geographic areas by which narrowband PCS is licensed. The 487 BTAs are defined in the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, pp. 36-39. Additionally, American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and United States Virgin Islands are licensed separately and are treated as if BTAs for licensing purposes.

Effective Radiated Power (e.r.p.) (in a given direction). The product of the power supplied to the antenna and its gain relative to a half-wave dipole in a given direction.

Fixed Service. A radiocommunication service between specified fixed points.

Fixed Station. A station in the fixed service.

Height Above Average Terrain (HAAT). Height of the center of the radiating element of the antenna above the average terrain. See § 90.309(a)(4) for calculation method.

Land Mobile Service. A mobile service between base stations and land mobile stations, or between land mobile stations.

Land Mobile Station. A mobile station in the land mobile service capable of surface movement within the geographic limits of a country or continent.

Land Station. A station in the mobile service not intended to be used while in motion.

Major Trading Area (MTA). One of the geographic areas by which narrowband PCS is licensed. MTAs are defined in the Rand McNally 1992 Commercial Atlas and Marketing Guide, 123rd Edition, pages 36-39. For licensing purposes Alaska is a separate area from the Seattle MTA. Guam and the Northern Mariana Islands are treated as a single MTA. Puerto Rico and United States Virgin Islands are treated as a single MTA. American Samoa is treated as a single MTA.

Mobile Service. A radiocommunication service between mobile and land stations, or between mobile stations.

Mobile Station. A station in the mobile service intended to be used while in motion or during halts at unspecified points.

Narrowband PCS. PCS services operating in the 901-902 MHz, 930-931 MHz, and 940-941 MHz bands.

Personal Communications Services (PCS). Very broadly defined and flexible radio services that encompass a wide array of mobile and ancillary fixed communication services, which could provide

services to individuals and business, and be integrated with a variety of competing networks.

Subpart B - Applications and Licenses

§ 99.11 Scope.

This subpart contains procedures and requirements for filing applications for licenses to operate radio facilities in the Personal Communications Services. Part 1 of the Commission's rules contain additional applicable rules governing forms (§ 1.922), fees (§ 1.1102), processing procedures (§ 1.953), special temporary authority (§ 1.925), assignment or transfer of control (§ 1.924), and environmental impact (§ 1.1301). Part 17 contains applicable rules regarding tower lighting (§§ 17.7 - 17.17).

§ 99.12 Licensed service areas.

(a) Narrowband PCS nationwide licensed service area: 50 states, District of Columbia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and United States Virgin Islands.

(b) Narrowband PCS regional licensed service areas: 47 Major Trading Areas as defined in the Rand McNally 1992 Commercial Atlas & Marketing Guide, except that Alaska is separated from the Seattle MTA and is licensed separately. Guam and the Northern Mariana Islands are treated as a single MTA. Puerto Rico and United States Virgin Islands are treated as a single MTA. American Samoa is treated as a single MTA.

(c) Narrowband PCS local licensed service areas: 487 Basic Trading Areas as defined in the Rand McNally 1992 Commercial Atlas & Marketing Guide. American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and United States Virgin Islands each are licensed separately.

§ 99.13 Eligibility.

Any person or entity not excluded by 47 U.S.C. § 310 is eligible to hold a license under this part.

§ 99.14 Regulatory Status.

[reserved]

§ 99.15 License Term.

Licenses for service areas will be issued for a term of ten years from the date of original issuance or renewal.

§ 99.17 Construction Requirements.

(a) For narrowband PCS systems:

(1) Licensees of nationwide service area channels must construct at least 250 base stations within five years of being licensed and at least 500 base stations within ten years of being licensed and notify the Commission when each benchmark is met.

(2) MTA licensees must construct base stations to provide coverage to approximately 25% of the geographic area of their licensed service area within five years of being licensed and 50% of the geographic area of their licensed service area within ten years of being licensed. Alteratively, licensees of MTA service area channels must construct at least 25 base stations within five years of being licensed and 50 base stations within ten years of being licensed. In either case, the MTA licensee must notify the Commission when each benchmark is met.

(3) Licensees of BTA service area channels must construct at least one base station and begin providing service in their licensed service area within one year of being licensed and notify the Commission when the benchmark is met.

(4) In evaluating compliance with the above construction requirements, each base station will be considered to serve a geographic area of 3000 square kilometers. In the case where a licensee constructs low power base stations, compliance with the construction requirements will be determined by aggregating the actual service areas of the low power stations divided by 3000 square kilometers to determine an equivalent number of base stations.

(5) Failure by any licensee to meet the above construction requirements will result in forfeiture of the license and the licensee will be ineligible to regain it.

Subpart C - Technical and Operating Requirements

§ 99.401 Scope.

This subpart sets forth the technical requirements for use of the spectrum and equipment in the radio services governed by this part. Such requirements include frequency channelizations and standards for equipment authorization, transmitter power, antenna height, and signal strength. Included in this subpart are interference criteria for co-channel operations.

§ 99.403 Equipment authorization.

(a) Each transmitter utilized for operation under this part and each transmitter marketed, as set forth in § 2.803 of Part 2 of this Chapter, must be of a type that has been authorized by the Commission under its type acceptance procedure for use under this part.

(b) The Commission periodically publishes a list of type accepted equipment, entitled "Radio Equipment List, Equipment Accepted for Licensing." Copies of this list are available for public reference at the Commission's offices in Washington, D. C., and at each of its field offices.

(c) Any manufacturer of radio transmitting equipment to be used in these services may request equipment authorization following the procedures set forth in Subpart J of Part 2 of this chapter. Equipment authorization for an individual transmitter may be requested by an applicant for a station authorization by following the procedure set forth in Part 2. Such equipment if approved or accepted will not normally be included in the Commission's Radio Equipment List but will be individually enumerated on the station authorization.

(d) Applicants for type acceptance of transmitters that operate in these services must submit a statement confirming that the equipment complies with IEEE C95.1-1991, "IEEE Standards for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz." Measurement methods are specified in IEEE C95.3-1991, "Recommended Practice for the Measurement of Potentially Hazardous Electromagnetic Fields - RF and Microwave." The applicant for type acceptance is required to maintain a record showing the basis for the statement of compliance with IEEE C.95.1-1991.

§ 99.405 Frequencies.

(a) Licensed personal communications radio services will be authorized in the 901-902 MHz, 930-931 MHz, and 940-941 MHz bands. Licenses under this part will be issued based on the following frequency blocks, which are listed by center frequency. Unless otherwise specified, the frequencies are paired.

Nationwide Blocks (MHz)

Base	Mobile
50 kHz	50 kHz
940.025	901.025
940.075	901.075
940.125	901.125
940.175	901.175
940.225	901.225
50 kHz	12.5 kHz
930.425	901.75625
930.475	901.76875
930.525	901.78125

50 kHz Unpaired

940.775
940.825
940.875

MTA Blocks (MHz)

Base	Mobile
50 kHz	50 kHz
940.275	901.275
940.325	901.325
940.375	901.375
940.425	901.425

50 kHz	12.5 kHz
930.575	901.79375
930.625	901.80625
930.675	901.81875
930.725	901.83125
930.775	901.84375
930.825	901.85625
930.875	901.86875

50 kHz Unpaired

940.925
940.975

BTA Blocks (MHz)

Base	Mobile
50 kHz	12.5 kHz
930.925	901.88125
930.975	901.89375

12.5 kHz Unpaired[1]

901.90625
901.91875
901.93125
901.94375
901.95625
901.96875
901.98125
901.99375

[1] These mobile station frequencies are restricted to entities licensed under Parts 22 and 90 of this chapter.

(b) A single licensee is permitted to hold licenses for up to three 50 kHz channels, paired or unpaired. This limit is based on the total spectrum in the licensee's nationwide, regional, and local licenses at any geographic point.

§ 99.406 Authorized Bandwidth

The maximum authorized bandwidth of narrowband PCS channels will be 10 kHz for 12.5 kHz channels and 45 kHz for 50 kHz channels.

For aggregated adjacent channels, a maximum authorized bandwidth of 5 kHz less than the total aggregated channel width is permitted.

§ 99.407 Power/antenna height limits.

(a) Stations transmitting in the 901-902 MHz band are limited to 7 watts e.r.p.

(b) Mobile stations transmitting in the 930-931 MHz and 940-941 MHz bands are limited to 7 watts e.r.p.

(c) Base stations transmitting in the 930-931 MHz and 940-941 MHz bands are limited to 3500 watts e.r.p. per authorized channel and are unlimited in antenna height except as provided for in paragraph (d) below.

(d) MTA and BTA base stations located between 200 kilometers (124 miles) and 80 kilometers (50 miles) from their licensed service area border are limited to the power levels in following table:

Antenna Height Above Average Terrain in meters (feet)	Effective Radiated Power (e.r.p.) (watts)
183 (600) and below	3500
183 (600) to 208 (682)	3500 to 2584
208 (682) to 236 (775)	2584 to 1883
236 (775) to 268 (880)	1883 to 1372
268 (880) to 305 (1000)	1372 to 1000
305 (1000) to 346 (1137)	1000 to 729
346 (1137) to 394 (1292)	729 to 531
394 (1292) to 447 (1468)	531 to 387
447 (1468) to 508 (1668)	387 to 282
508 (1668) to 578 (1895)	282 to 206
578 (1895) to 656 (2154)	206 to 150
656 (2154) to 746 (2447)	150 to 109
746 (2447) to 848 (2781)	109 to 80
848 (2781) to 963 (3160)	80 to 58
963 (3160) to 1094 (3590)	58 to 42
1094 (3590) to 1244 (4080)	42 to 31
1244 (4080) to 1413 (4636)	31 to 22
Above 1413 (4636)	16

For heights between the values listed above, linear interpolation shall be used to determine maximum e.r.p.

(e) Regional and local base stations located less than 80 kilometers (50 miles) from the licensed service area border must limit their effective radiated power in accordance with the following formula:

$$P_W = 0.0175 \times d_{km}^{6.6666} \times h_m^{-3.1997}$$

P_W is effective radiated power in watts
d_{km} is distance in kilometers
h_m is antenna height above average terrain in meters

(f) All power levels specified above are expressed in terms of the maximum power, averaged over a 100 millisecond interval, when measured with instrumentation calibrated in terms of an rms-equivalent voltage with a resolution bandwidth equal to or greater than the authorized bandwidth.

(g) Additionally, PCS stations will be subject to any power limits imposed by international agreements.

§ 99.409 RF Hazards

Manufacturers are required to comply with IEEE C95.1-1991. For the purposes of determining compliance with this standard, all equipment shall be considered to operate in an "uncontrolled" environment.

§ 99.411 Emission limits for the 901-902 MHz, 930-931 MHz, and 940-941 MHz bands.

(a) The power of any emission shall be attenuated below the transmitter power (P) in accordance with the following schedule:

(1) For transmitters authorized a bandwidth (B) greater than 10 kHz:

(i) On any frequency outside the authorized bandwidth and removed from the edge of the authorized bandwidth by a displacement frequency (f_d in kHz) of up to and including 40 kHz: at least 116 Log_{10} ((f_d + 10) / 6.1) decibels or 50 plus 10 Log_{10} (P) decibels or 70 decibels, whichever is the lesser attenuation;

(ii) On any frequency outside the authorized bandwidth and removed from the edge of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 40 kHz: at least 43 Log_{10} (P) decibels or 80 decibels, whichever is the lesser attenuation.

(2) For transmitters authorized a bandwidth (B) of 10 kHz:

(i) On any frequency outside the authorized bandwidth and removed from the edge of the authorized bandwidth by a displacement frequency (f_d in kHz) of up to and including 20 kHz: at least 116 Log_{10} ((f_d + 5) / 3.05) decibels or 50 plus 10 Log_{10} (P) decibels or 70 decibels, whichever is the lesser attenuation;

(ii) On any frequency outside the authorized bandwidth and removed from the edge of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 20 kHz: at least 43 plus 10 Log_{10} (P) decibels or 80 decibels, whichever is the lesser attenuation.

(b) The measurements of emission power can be expressed in peak or average values provided they are expressed in the same parameters as the transmitter power.

(c) When an emission outside of the authorized bandwidth causes harmful interference, the Commission may, at its discretion, require greater attenuation than specified in this section.

(d) The following minimum spectrum analyzer resolution bandwidth settings will be used: 300 Hz when showing compliance with paragraphs (a)(1)(i) and (a)(2)(i); and 30 kHz when showing compliance with paragraphs (a)(1)(ii) and (a)(2)(ii).

§ 99.417 Co-channel separation criteria in the 901-902, 930-931, and 940-941 MHz bands.

The minimum co-channel separation distance between base stations in different service areas is 113 kilometers (70 miles). A co-channel separation distance is not required for the base stations of the same licensee or when the affected parties have agreed to other co-channel separation distances.

§ 99.419 Frequency stability requirements for the 901-902, 930-931, and 940-941 MHz bands.

(a) The frequency stability of the transmitter shall be maintained within ± 0.0001% (± 1 ppm) of the center frequency over a temperature variation of -30 degrees to +50 degrees C at normal supply voltage, and over a variation in the primary supply voltage of 85% to 115% of the rated supply voltage at a temperature of 20 degrees C.

(b) For battery operated equipment, the equipment tests shall be performed using a new battery without any further requirement to vary supply voltage.

(c) It is acceptable for a transmitter to exceed this frequency stability requirement over a narrower temperature range provided the transmitter ceases to function before it exceeds these frequency stability limits.

APPENDIX B: FINAL REGULATORY FLEXIBILITY ANALYSIS

Pursuant to 5 U.S.C. Section 603, an initial Regulatory Flexibility Analysis was incorporated in the Notice of Proposed Rule Making and Tentative Decision in combined ET Docket No. 92-100 and GEN Docket No. 90-314. Written comments on the proposals in the Notice, including the Regulatory Flexibility Analysis, were requested.

A. Need for and Objective of Rules: Our objective is to provide an allocation for PCS services that require narrower bandwidth blocks of spectrum than the requests for wider bandwidth blocks at 2 GHz. We believe that the flexibility of the Rules adopted will enable a diversity of services, including enhanced paging and messaging services.

B. Issues Raised by the Public in Response to the Initial Analysis: No party suggested modifications specifically to the initial regulatory flexibility analysis.

C. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives: We have reduced burdens wherever possible. The regulatory burdens we have retained are necessary to ensure that the public receives the benefits of innovative new services in a prompt and efficient manner. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant impact on small entities. The Secretary will sent a copy of this Report and Order to the Chief Counsel for Advocacy of the Small Business Administration.

APPENDIX C: SAFETY LEVEL CALCULATIONS

1. Maximum Permissible Exposure (MPE).

   a. Determine MPE for uncontrolled environment for mobile units:

   $S = f/1500$ (mW/cm^2) for 300 MHz $\leq f \leq$ 3000 MHz

   where S is equivalent plane-wave free-space power density as averaged over any 30 minutes, and f is frequency transmitted in MHz.

   $S = 901/1500 = 0.601$ mW/cm^2

   b. Derive separation distance from allowed power density:

$$p_d = \frac{p_a \times g_i}{4 \times \Pi \times R^2}$$

   where p_d is power density at the point of observation (equivalent to S), p_a is power supplied to the antenna, g_i is antenna gain (numeric) in a given direction relative to an isotropic antenna, and R is the distance from the power radiated by the transmitting antenna to the point of observation.

   e.i.r.p. = p_a x g_i

   Desire 7 watts e.r.p.:

   e.i.r.p. = 1.64 x e.r.p. = 1.64 x 7
   = 11.48 watts = 11,480 mW

   Solve for R:

$$R = \sqrt{\frac{e.i.r.p.}{4 \times \Pi \times p_d}}$$

$$R = \sqrt{\frac{11{,}480 mW}{4 \times \Pi \times 0.601 mW/cm^2}}$$

R = 38.99 cm (15.35 in)
Round to 39 cm (15.4 in).

2. Radiated Power Exclusion.[122] Use the exclusion for low-power devices in uncontrolled environments:

For 901-902 MHz mobile-to-base band:

Radiated power $\leq$ 1.4(450/f) watts for 450 MHz $\leq$ f $\leq$ 1500 MHz, and radiating structure $\geq$ 2.5 cm from the body, except the hands.

Radiated power $\leq$ 1.4 x 450 / 902
Radiated power $\leq$ 698 mW
Round to 700 mW

Radiated power $\leq$ 700 mW, and the radiating structure $\geq$ 2.5 cm from the body, except the hands.

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[122] Note that in the reactive near field of a hand-held device radiated power and not e.i.r.p. is the appropriate term to use.

Separate Statement

of

Commissioner Andrew C. Barrett

Re: Rules to Establish New Personal Communications Services [ET Docket 92-100 and Gen Docket 90-314]

In this First Report and Order, the Commission adopts a channelization scheme of local, regional and national licenses that permits flexibility for large and small advanced messaging operations. In addition to creating approximately 5,500 new licensing opportunities in the 900 MHz PCS service, the item also allows operators to aggregate up to 150 kHz paired channels [or a total of 300 kHz] which will permit newer versions of advanced messaging to evolve. I am satisfied that the item provides sufficient new opportunities for large and small players in this service. I also am encouraged that the Commission retains 1 MHz of spectrum for future channelization and spectrum requirements that may evolve. Finally, I support our construction requirements in this Order, and will monitor closely the manner in which PCS operators satisfy these rules. Spectrum is too valuable to allow any licensee to sit on its channel, while others are precluded from bringing new, exciting services to the market.

I look forward to addressing the challenging issues the Commission will face in a further action on the licensing scheme and regulatory treatment. I believe a Further Notice of Proposed Rulemaking will be required to address those issues in a comprehensive manner. I anticipate that the impact of competitive bidding on small business participants will need to be addressed fully in a future Commission action on 900 MHz PCS licensing.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 28, 1993

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

American Broadcast Financial Corporation - Request for refund of a filing fee for a new FM station at Manistee, Michigan - **Denied** (August 27, 1993).

Atwood, Stephen L. - Request for reinstatement of an application for station K17BU at Mesa, Arizona - **Granted** (September 1, 1993).

Battaglia, Frank E. - Request for refund of a filing fee for WALE-AM at Providence, Rhode Island - **Denied** (August 24, 1993).

Daniels, Thomas B. - Request for refund of a hearing fee for a new FM station at Ladson, South Carolina - **Granted** (September 3, 1993).

Ellerbeck, Susan M. - Request for reinstatement of an application for a new cellular radio service in Market No. 289, at Rapid City, South Dakota - **Granted** (September 1, 1993).

Hago, Wilson - Request for refund of filing fees submitted in connection with two applications in Market 124, Frequency Blocks A and B - **Denied** (September 13, 1993).

Local Television Associates, Inc. - Request for refund of a hearing fee for a new UHF TV station at Jacksonville, North Carolina - **Granted** (September 3, 1993).

Michaelsen, Ronald J. - Request for refund of a hearing fee for a new FM station at Cedar Falls, Iowa - **Granted** (September 3, 1993).

Northwoods Broadcasting, Inc. - Request for refund of a filing fee for two stations at Rhinelander, Wisconsin - **Granted** (September 9, 1993).

Pioneer Electronic Corporation - Request for refund of filing fees for two applications for equipment authorization - **Denied** (September 1, 1993).

Rose Communications Corporation - Request for refund of a hearing fee for a new FM station at Westhampton, New York - **Granted** (September 9, 1993).

Shawnee Broadcasting Corp. - Request for refund of a hearing fee for a new FM station at St. Marys, Kansas - **Granted** (September 3, 1993).

Tilton, Joseph W. d/b/a Denero Dimensions - Request for refund of a hearing fee for a new FM station at Elk City, Oklahoma - **Granted** (September 13, 1993).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202) 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

AUG 27 1993

Ms. Caroline K. Powley
101 Rubin Court A-4
Cary, North Carolina 27511

Dear Ms. Powley:

This is in response to your request for refund of the filing fee that you submitted with your application for a new FM station at Manistee, Michigan.

You filed the application on May 18, 1990. However, American Broadcast Financial Corporation (American) had filed an application for the same allocation on April 10, 1990. Also, since the filing window had closed prior to the filing of American's application, its became the lead application for processing purposes and your application was placed in a queue for processing only if American's application could not be granted. Subsequently, the Mass Media Bureau granted American's application and dismissed your application. See letter from Dennis Williams, Chief, FM Branch, to American Broadcast Financial Corporation, dated June 26, 1992.

Section 1.1111(c) provides the circumstances under which an applicant filing a first come/first serve application following the close of a filing window will be entitled to a refund of its filing fee. Specifically, that section provides that the first come/first serve applicant will be entitled to a refund only if the applicant requests dismissal of its application and refund of its application fee within fifteen days of the issuance of a public notice announcing the pendency of an earlier filed mutually exclusive application. See 47 C.F.R. § 1.1111(c). In the instant case, a public notice announcing the acceptance of American's application was released on October 3, 1990. Your refund request, however, was not filed until July 12, 1993, twenty one (21) months after American's application was accepted for filing. Therefore, your request is untimely pursuant to section 1.1111(c).

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

SEP 1 1993

Brian M. Madden, Esq.
c/o Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006-1809

Dear Mr. Madden:

This will respond to your request for reinstatement of the major change modification application filed on behalf of Stephen L. Atwood, licensee of television translator station K17BU, Mesa, Arizona. You state, and your documentation shows, that the dismissal of the original application was attributed to the fact that the bank erred in dishonoring the fee payment.

Where an applicant makes a convincing showing that failure to honor the fee payment was due to bank error, the Commission's rules permit the reinstatement of the application, and further permit the date of the original submission to be considered the date of the subsequent filing. See 47 C.F.R. §1.1114(a)(2); see also Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1985, 3 FCC Rcd 5987, 5992 (1988).

Based on the foregoing, your request for reinstatement of the original application is granted.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

August 24, 1993

OFFICE OF
MANAGING DIRECTOR

Richard J. Hayes, Jr., Esq.
13809 Black Meadow Road
Greenwood Plantation
Spotsylvania, Virginia 22553

Dear Mr. Hayes:

This is in response to your request for refund of a filing fee submitted by Frank E. Battaglia on behalf of WALE-AM, Providence, Rhode Island in connection with its transfer of control application.

You have explained that the application was accompanied by a $565.00 money order as payment of the filing fee. You also explain that the application was returned as unacceptable for filing because an obsolete version of FCC Form 315 was used for the application. See Letter to Richard J. Hayes, Jr., 1800B3-DW, (Ed Jorgensen, Assistant Chief-Law, FM Branch, Audio Services Division, released May 3, 1993).[1] You now seek refund of the filing fee. In addition, you further state that Mr. Battaglia wishes to have you resubmit the application on current FCC Form 315 together with another $565.00 filing fee.

We are unable to refund or return Mr. Battaglia's fee. The Commission resolved this basic issue when it implemented the Fee Collection Program: "except for the limited instances enumerated in new section 1.1111 of the rules, fees will be retained by the government irrespective of the substantive disposition of the underlying application or filing." Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947, 949 (1987). Section 1.1111 of the rules does not provide for refund of the filing fee where an application is returned because it was submitted on an obsolete form.

However, Section 1.1107(d) of the Commission's rules provides that no fee payment will be required when an applicant resubmits an application returned for corrections or additional information. Because, as we understand it, Mr. Battaglia intends to resubmit his application on current FCC Form 315, we will permit him to refile the transfer of control application for

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[1] You explain that this letter mistakenly identified the station as a FM rather than AM station, and also mistakenly licensed WALE-AM to Spotsylvania, Virginia, rather than Providence, Rhode Island, but is accurate in all other respects.

Station WALE-AM without an additional fee. The refiled application should be sent directly to James Burtle, Chief, AM Branch, and a copy of this letter should accompany the refiled application in lieu of an additional fee.

If you have any questions about this procedure, please call the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

cc: James Burtle, Chief, AM Branch,
Audio Services Division

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

SEP 3 1993

Dan J. Alpert, Esq.
1250 Connecticut Avenue, N.W.
7th Floor
Washington, D.C. 20036-2603

Re: Thomas B. Daniels
New FM Station
Ladson, South Carolina
Fee Control # 9302258170423001

Dear Mr. Alpert:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

__X__ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

SEP 1 1993

David J. Kaufman, Esq.
Marjorie K. Conner, Esq.
c/o Brown, Nietert & Kaufman
1920 N Street, N.W.
Suite 660
Washington, D.C. 20036

Dear Mr. Kaufman and Ms. Conner:

This will respond to your request for reinstatement of the application for a new cellular radio service in Market No. 289, Rapid City, South Dakota, filed on behalf of Susan M. Ellerbeck. You state, and your documentation shows, that the dismissal of the application was attributed to the fact that the bank erred in dishonoring the fee payment.

Where an applicant makes a convincing showing that failure to honor the fee payment was due to bank error and includes a substitute payment, the Commission's rules permit the reinstatement of the application, and further permit the date of the original submission to be considered the date of the subsequent filing. See 47 C.F.R. §1.1114(a)(2); see also Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1985, 3 FCC Rcd 5987, 5992 (1988).

Based on the foregoing, your request for reinstatement of the original application will be granted upon the submission of a substitute payment. If you have any questions concerning this matter, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

SEP 13 1993

Mr. Wilson Hago
Box H
Brown University
Chemistry Department
Providence, Rhode Island 02912

Dear Mr. Hago:

This is in response to your request for refund of filing fees you submitted in connection with cellular unserved area applications in Market 124, Frequency Blocks A and B.

You refer us to the letter of May 27, 1993 from the Chief, Mobile Services Division of the Common Carrier Bureau, which dismissed your applications as defective and unacceptable for filing because both applications violated section 22.902(b)(4)(i) of the Commission's rules. 47 C.F.R. §22.902(b)(4)(i). You now request refund of your application fees for the two Frequency Blocks noted above which aggregate ~~to~~ $460.00.

We are unable to refund or return your fees. The Commission resolved this basic issue when it implemented the Fee Collection Program:

> [E]xcept for the limited instances enumerated in new section 1.1111 of the rules, fees will be retained by the government irrespective of the substantive disposition of the underlying application or filing. Therefore, once an application has cleared the fee review process, its subsequent rejection by the relevant bureaus or offices will not result in a fee refund.

Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947, 949 (1987). Section 1.1111 of the rules does not provide any authority for refund of the filing fee where an application is returned because it was found defective and unacceptable for filing because it violated the rules.

Accordingly, your request for fee refunds is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

SEP 3 1993

David D. Oxenford, Esq.
Fisher, Wayland, Cooper
and Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037-1170

Re: Local Television Associates, Inc.
New UHF TV Station
Jacksonville, North Carolina
Fee Control # 9204098170350001

Dear Mr. Oxenford:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

__X__ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

SEP 3 1993

Donald E. Martin, Esq.
2000 L Street, N.W.
Suite 200
Washington, D.C. 20036

Re: Ronald J. Michaelsen
New FM Station
Cedar Falls, Iowa
Fee Control # 9211028170398004

Dear Mr. Martin:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

__X__ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

SEP 9 1993

John M. Burgett, Esq.
Fisher, Wayland, Cooper
and Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037-1170

Dear Mr. Burgett:

This will respond to your request for refund of a fee filed on behalf of Northwoods Broadcasting, Inc., ("Northwoods") the licensee of WOBT(AM) and WRHN(FM) Rhinelander, Wisconsin in connection with its filing of Northwoods' Annual Ownership Report. You state that Northwoods inadvertently filed the Ownership Report, and subsequently filed its Certification of No Change along with the accompanying fee. You contend that the fee should be refunded because Northwoods in effect paid twice with respect to its annual ownership filing.

Section 73.3615 requires that broadcast licensees file annually either an Ownership Report or a Certification of No Change. Therefore, Northwoods was not required to file both the Report and the Certification; the filings were duplicative. Under the circumstances, refund of the filing fee is warranted. See 47 C.F.R. §1.1111(a)(1).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $70.00 will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

SEP 1 1993

Mr. Le Van Lac, Vice President
Pioneer Electronics Service, Inc.
1925 E. Dominguez St.
Post Office Box 1760
Long Beach, California 90801-1760

Dear Mr. Lac:

This is in response to your letter requesting refunds of two fee payments filed by Pioneer Electronic Corporation (Pioneer) covering its applications for equipment authorizations.

The Office of Engineering and Technology (OET) dismissed the subject applications because Pioneer styled its applications to request initial equipment authorizations, and the Bureau determined that applications for the subject equipment had been previously granted. As such, the applications should have requested modification of Pioneer's existing authorizations rather than initial approval. In returning the applications, OET notified Pioneer that the applications could be corrected to comply with the Commission's application requirements, and refiled. Section 1.1107(d) of the Commission's rules provides that no additional fee will be due when an applicant resubmits a corrected application. However, Pioneer determined not to refile its applications since the market for the subject equipment appeared uncertain.

The Commission's rules do not provide for the refund of application fees when defective applications are returned for correction and the applicant decides not to refile. Moreover, we cannot find that Pioneer's decision not to refile its applications, due to its uncertainty concerning its equipments' future market potential, provides sufficient grounds for a waiver of the fee retention requirement. See 47 C.F.R. § 1.1115. Therefore, your request for refund cannot be granted. However, in view of Pioneer's confusion, described in your letter, concerning the Commission's requirements leading to the early filing of its applications, we will extend to Pioneer an additional period of thirty days to file corrected applications without a fee payment requirement, if in Pioneer's view current circumstances so warrant.

Accordingly, your request is denied. For the reasons discussed above, Pioneer may file corrected applications covering the subject equipment within thirty days from the date of this letter without submitting additional application fees. A copy of the instant letter should be submitted with each application.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

SEP 9 1993

Lewis J. Paper, Esq.
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005-3919

Re: Rose Communications Corporation
Westhampton, New York
Fee Control # 9302238170418003

Dear Mr. Paper:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

__X__ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

SEP 3 1993

Shelley Sadowsky, Esq.
Rosenman & Colin
1300 19th Street, N.W.
Washington, D.C. 20036

Re: Shawnee Broadcasting Corp.
New FM Station
St. Marys, Kansas
Fee Control # 9203048170339001

Dear Ms. Sadowsky:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

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__X__ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

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Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

SEP 13 1993

William J. Pennington, III, Esq.
4 Creekside Drive
P.O. Box 2506
Pawleys Island, South Carolina 29585

Re: Joseph W. Tilton
d/b/a Denero Dimensions
Elk City, Oklahoma
Fee Control # 9302258170422002

Dear Mr. Pennington:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

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Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

*U.S. Government Printing Office: 1993 — 300-842/00002